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1 IN THE UNITED STATES DISTRICT COURT
 2 FOR THE EASTERN DISTRICT OF TEXAS
 3 TEXARKANA DIVISION
 4 - - - - - X
 5 THE STATE OF TEXAS, :
 6 Plaintiff, :
 7 v. : CIVIL ACTION
 8 THE AMERICAN TOBACCO COMPANY; : NO. 5-96CV91
 9 R.J. REYNOLDS TOBACCO COMPANY; : UNITED STATES
 10 BROWN & WILLIAMSON TOBACCO : JUDGE:
 11 CORPORATION; B.A.T. INDUSTRIES, : DAVID FOLSOM
 12 P.L.C.; PHILIP MORRIS, INC.; : UNITED STATES
 13 LIGGETT GROUP, INC.; LORILLARD : MAGISTRATE:
 14 TOBACCO COMPANY, INC.; UNITED : WENDELL C.
 15 STATES TOBACCO COMPANY; HILL & : RADFORD
 16 KNOWLTON, INC.; THE COUNCIL :
 17 FOR TOBACCO RESEARCH-USA, INC. :
 18 (Successor to Tobacco Institute :
 19 Research Committee); and :
 20 THE TOBACCO INSTITUTE, INC., :
 21 Defendants. :
 22 - - - - - X
 23 Washington, D.C.
 24 Saturday, October 4, 1997
 25 Deposition of ROBERT F. DRINAN, SJ, a

1 witness herein, called for examination by counsel
 2 for Brown & Williamson in the above-entitled
 3 matter, pursuant to notice, the witness being
 4 duly sworn by MARY GRACE CASTLEBERRY, a Notary
 5 Public in and for the District of Columbia, taken
 6 at the offices of Arnold & Porter, 555 12th
 7 Street, N.W., at 8:45 a.m., Saturday, October 4,
 8 1997, and the proceedings being taken down by
 9 Stenotype by MARY GRACE CASTLEBERRY, RPR, and
 10 SUSAN L. CIMINELLI, CRR, RPR, transcribed under
 11 their direction.
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C O N T E N T S

WITNESS	EXAMINATION BY COUNSEL FOR
ROBERT F. DRINAN, SJ	DEFENDANT BROWN &
	WILLIAMSON
By Mr. McCormick	7

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21 the Tobacco industry's External
22 Research Program
23 5* Law Review article by Drinan
24
25 * Drinan Exhibit No. 5 was retained by counsel.

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7

1 P R O C E E D I N G S
2 Whereupon,
3 ROBERT F. DRINAN, SJ,
4 business address at Georgetown University Law
5 Center, 600 New Jersey Avenue, N.W., Washington,
6 D.C. 20001, was called as a witness by counsel
7 for Brown & Williamson, and having been duly
8 sworn by the Notary Public, was examined and
9 testified as follows:
10 EXAMINATION BY COUNSEL FOR DEFENDANT
11 BROWN & WILLIAMSON
12 BY MR. McCORMICK:
13 Q. Father Drinan, would you tell us when
14 the first time was that you were contacted in
15 connection with giving testimony in this case?
16 A. Many months ago. And frankly, I've
17 forgotten the actual persons who contacted me. I
18 get contacted a lot and a lot of them I decline.
19 But I think it was months anyway.
20 Q. Was it this year, in 1997?
21 A. Probably.
22 Q. And you say you don't remember the
23 person who contacted you first?
24 A. No.
25 Q. Who is the first person that you

8

1 remember talking to about this case?
2 A. Well, some of these, these two
3 gentlemen here, but others too. But mostly these
4 two and others in their association.
5 Q. But you don't remember who made the

6 first call to you?

7 A. No, I'm surprised but I don't.

8 Q. Do you know how it is that they came to
9 contact you about this?

10 A. Well, my name is out there and as an
11 expert in legal ethics. I was the one that
12 established this ten years ago, the Georgetown
13 Journal of Legal Ethics and people read this.
14 And I also was a consultant to the Resolution
15 Trust Corporation in connection with the S&Ls.
16 So my name is around on things and they know me
17 from Georgetown and other connections.

18 Q. Have you ever had any involvement
19 before that contact, however many months ago it
20 was, in connection with smoking and health
21 litigation or with the tobacco industry?

22 A. Not as an expert on legal ethics, no.

23 Q. Have you had any other connection?

24 A. Well, I think as a citizen, we've all
25 had connections. And I go back to the '60s when

9

1 I knew Dr. Carl Seltzer and I think we were all
2 informed over 30 years of the problems.

3 Q. Of smoking and health? Father, you're
4 going to need to answer yes or no for the record
5 here.

6 A. All right.

7 Q. In terms of any involvement in
8 litigation?

9 A. No.

10 Q. None before this contact?

11 A. No.

12 Q. And have you had any involvement since
13 you were first contacted some months ago with any
14 case or in connection with any lawsuit, tobacco
15 lawsuit, other than the State of Texas case?

16 A. No, except that the attorney general of
17 Pennsylvania, who is a Georgetown grad, saw me a
18 week or two ago in Pittsburgh and he wrote me a
19 letter, would I want to help them. And one of
20 his associates called me yesterday. I said,
21 let's defer everything. That's the only
22 contact.

23 Q. And would you tell me, Father, as best
24 you can remember, who all of the various
25 plaintiff's lawyers that you've dealt with in

10

1 connection with this case?

2 A. Well, these two people here, and they
3 had me down to Texarkana for a weekend and I met
4 Mr. John O'Quinn.

5 Q. Anybody else?

6 A. Well, I met two or three others there,
7 whose name I don't recall, in Texarkana.

8 Q. Can you go back as far as your
9 recollection takes you in terms of these
10 discussions and tell me, if you would, what it
11 was that you were asked to do, basically, in this
12 case.

13 A. Well, in essence, it was to be an
14 expert on the legal ethics. And that's set forth
15 in the statement that all of you have. And that
16 this was worked out as to what I would testify as

17 to the lawyers and the ethical objectives.

18 Q. And can you tell us what it is that
19 you've done? We know and we'll come back to in a
20 few minutes that you've reviewed a large volume
21 of documents. You've had some conversations with
22 these lawyers here today for the plaintiffs as
23 well as others in Texarkana. What else besides
24 those two things have you done in preparing to
25 testify in this case?

11

1 A. Well, I've reviewed the basic model
2 rules of the ABA and also the Texas version of
3 the rules. And the numbers are mentioned in the
4 expert disclosure statement here. And those are
5 the object of my study for a long time because
6 I've been teaching legal ethics for at least ten
7 years at Georgetown law school and we go through
8 all of them with regard to the ethical objectives
9 for aspirations of lawyers.

10 Q. So you reviewed the ABA model rules and
11 the Texas rules, is that correct?

12 A. That's right.

13 Q. Did you review the rules of any other
14 state?

15 A. I'm familiar with the other states.
16 They don't substantially differ in this. I'm
17 very familiar with D.C. I'm a member of the bar
18 there.

19 Q. And what other states are you familiar
20 with?

21 A. I'm familiar with Massachusetts because
22 I'm a member of the bar there too. And they now
23 finally have adopted the model rules.

24 Q. Any other state that you're familiar
25 with?

12

1 A. I'm familiar with all of them but I
2 would be familiar only if there is some
3 difference, and there aren't many differences.

4 Q. But what I'm getting at, Father, is
5 presumably you are going to appear in this case
6 as an expert in legal ethics, correct?

7 A. That's right.

8 Q. And do you regard yourself as an expert
9 on the ethical rules of the State of Texas?

10 A. Yes.

11 Q. And do you regard yourself as an expert
12 on the ethical rules of the District of Columbia?

13 A. Yes.

14 Q. And do you regard yourself as an expert
15 on the ethical rules for the State of
16 Massachusetts?

17 A. Less so.

18 Q. And do you regard yourself as an expert
19 on any other states' ethical rules?

20 A. Yes. On this issue, yes.

21 Q. What issue, now?

22 A. Of confidentiality and the lawyer
23 privilege and the whole lawyer-client
24 relationship.

25 Q. What other states do you regard

13

1 yourself as an expert in on those subjects?

2 A. Well, I don't think that they're really
3 that different, that you can be an expert on
4 Indiana. The books have all of them and many
5 variations thereof and I would be familiar with
6 the variations.

7 Q. But in connection with your work thus
8 far, Father, have you reviewed the ethical rules
9 or the case law surrounding those ethical rules
10 for any state other than the State of Texas?

11 A. Yes, a lot of the states. And I have a
12 book here, which is the Bible, the
13 Attorney-Client Privilege and Work Product
14 Doctrine. And this is put out by the litigation
15 section of the ABA. And this is more than you
16 want to know.

17 Q. Could I see that?

18 A. (Witness proffers document.)

19 Q. So you've just handed me a book titled
20 the Attorney-Client Privilege and the
21 Work-Products Doctrine, second edition, published
22 by the ABA section of litigation, is that
23 correct?

24 A. That's right.

25 Q. And have you relied on this in

14

1 connection with your testimony here today?

2 A. Yes.

3 Q. And you regard this as, as you put it,
4 as the Bible?

5 A. I didn't mean that Bible. Shall we say
6 it is authoritative.

7 Q. As far as you're concerned, it's the
8 leading authority on this subject in terms of --

9 A. Well, there are others too. I'm not
10 going to say that's better than all the others
11 but that's a handy thing to use. And there are
12 many, many other essays on this topic.

13 Q. And you would regard this as an
14 authoritative source?

15 A. Yes.

16 Q. We'll come back to that. Now, Father
17 Drinan, in addition to having reviewed the
18 ethical rules of Texas, the ABA model ethical
19 rules, whatever reading you've done of the book
20 that you've just shown us and the conversations
21 that you've had, have you done any other work in
22 connection with this case?

23 A. I've done work on this topic for ten or
24 12 years. I was president when the American Bar
25 Association adopted the model rules in August

15

1 1983. I had followed it very closely. And I
2 know some of the players there who were
3 important. And I have fought all the
4 controversies that have come about on this and
5 other topics since that time. I am now the
6 chairman of the standing committee on the
7 professionalism of the American Bar Association.
8 We meet again in October in Chicago. I am also a
9 consultant to the American law institute's
10 project on the law governing lawyers. And I meet
11 regularly with them. I met most recently in
12 Philadelphia with 50 other people. So this is

13 one of my major fields. And I just think that I
14 know the area and all the controversies.

15 Furthermore, in connection with the
16 Georgetown Journal of Legal Ethics, we've
17 published over 14,000 pages in ten years and I've
18 read every one of them.

19 Q. But actually, and I apologize because
20 my question wasn't focused enough, I was really
21 focusing on work that you had done since you were
22 originally contacted in this case in connection
23 with studying or any analysis that you have done
24 for the purpose of preparing for this case.

25 A. Well, I've read hundreds of thousands
16

1 of pages and I've read around it. People have
2 helped me to collect all the things that I said
3 and did in the Congress for ten years. So I have
4 studied intensively of this topic.

5 Q. And that's in connection with your
6 testimony here?

7 A. Yes.

8 Q. You say you've read thousands of pages,
9 and I assume by that you're referring to the
10 company documents that you were provided?

11 A. Yes.

12 Q. You say that people have also collected
13 for you the work that you have done in this area,
14 by this area, you're referring to legal ethics or
15 you're referring to tobacco?

16 A. Tobacco.

17 Q. And you've reviewed work that you had
18 done or statements you've made or writings that
19 you've done on that subject as well, is that
20 correct?

21 A. In the Congress from '71 to '81.

22 Q. Now, is there anything else that you've
23 done in connection with preparing specifically
24 for your testimony in this case?

25 A. Well, I was an expert for the RTC in
17

1 connection with the savings and loans and I
2 learned a lot there about topics that are related
3 to this.

4 Q. We'll come back to the RTC matter.
5 Have you had any meetings here in preparation for
6 your testimony in this case --

7 A. Yes.

8 Q. -- other than with the attorneys?

9 A. No.

10 Q. You haven't met any of the other expert
11 witnesses for the State of Texas?

12 A. Not to my knowledge, no. I've read
13 some of their testimony, though.

14 Q. I understand that and I'm going to ask
15 you some questions about that. But you haven't
16 had any meetings with them?

17 A. Not to my knowledge. Have I? No.

18 Q. And any discussions with anybody else
19 other than the lawyers about your testimony here?

20 A. God.

21 Q. Aside from the lawyers and God, anybody
22 else?

23 A. What do you mean anybody else?

24 Q. Well, anybody besides the lawyers. Any
25 people who are other witnesses in the case,

18

1 whether expert or not, lawyers for some other
2 case, anyone -- let me start my question over.
3 Aside from talking to the lawyers for the State
4 of Texas, the two gentlemen here and the people
5 you met in Texarkana, have you discussed this
6 case with anybody?

7 A. With the attorney general of
8 Pennsylvania, briefly, two or three minutes. And
9 we talked more about his case.

10 Q. Have you discussed the State of Texas
11 case with anyone else?

12 A. I mentioned that I'm here. I don't
13 know whether I discussed it or not. I try to
14 observe the confidentiality thing that I signed.

15 MR. CLARKSON: Do you mean, by
16 discussion, Counsel, whether or not he's
17 discussed it with any of his colleagues in casual
18 conversation or do you mean in the sense of
19 preparing for his testimony?

20 MR. McCORMICK: Well, my question was
21 really the former and not limited to his
22 colleagues.

23 BY MR. McCORMICK:

24 Q. My question is, have you had a
25 substantive discussion about this case, Father,

19

1 with anyone other than the lawyers for --

2 A. Not to --

3 Q. One thing we're going to have to try to
4 do today is you're going to have to let me finish
5 the question before you start your answer.

6 A. Go ahead.

7 Q. Have you had any substantive questions
8 with anyone about this case other than the
9 lawyers for the State of Texas?

10 A. Not to my knowledge.

11 Q. Now, we received, along with a letter
12 from one of the counsel for the state, from
13 Mr. Clark, in fact, a box of materials that had
14 been furnished to you to read, and I want to,
15 during the course of the deposition, go over some
16 of those materials, not every page of them. But
17 there are a number of them that I want to go over
18 with you, ask you some questions about.

19 Let me start with some general
20 questions about those materials. First of all,
21 included among them was an affidavit by
22 Dr. Thomas Murray, who, as you may recall, is the
23 biomedical ethicist expert for the State of Texas
24 in this case. Do you recall that?

25 A. I do.

20

1 Q. And you understand that he is, as we
2 understand it, to testify, while you are here as
3 an expert on the legal ethics side of it,
4 Dr. Murray is to testify on the biomedical ethics
5 side of it? Is that your understanding?

6 A. Yes.

7 Q. And is there anything in connection
8 with that affidavit of Dr. Murray's that you

9 reviewed that you disagree with?

10 A. I don't recall that but that confined
11 my testimony here to the area here that I know,
12 namely legal ethics. And when I read all these
13 other things, I respect that gentlemen but I'm
14 not in a position to take a position yes or no.

15 Q. On the subjects of Dr. Murray's
16 testimony, you would defer to him on that?

17 A. I would think.

18 Q. Do you understand from the affidavit or
19 from the discussions with counsel for the State
20 of Texas that Dr. Murray undertook a factual
21 investigation somewhat similar to, although
22 perhaps focused differently than the one you did?

23 A. Yes.

24 Q. And specifically, his factual
25 investigation was into the research, specifically

21

1 the scientific research conducted by and
2 sponsored by the tobacco companies. Did you
3 understand that?

4 A. Uh-huh.

5 Q. You have to answer, yes or no.

6 A. Yes.

7 Q. And you don't have any reason, do you,
8 Father, to doubt the accuracy of the reports that
9 Dr. Murray has made on the outcome of that
10 factual investigation?

11 A. I'm a lawyer and I'm not in the
12 position to make a judgment.

13 Q. Father, in the box that we received
14 from Mr. Klok, we had the affidavit of Dr. Murray
15 but you understand that he's been deposed, he's
16 given a deposition in this case?

17 A. Yes.

18 Q. And have you read that deposition as
19 well?

20 A. I'm not certain.

21 Q. All right.

22 A. If it was sent to me, I read it.

23 Q. I understand. And it may have been
24 and -- but it wasn't in the box that we got. You
25 understand as a lawyer that the affidavit

22

1 prepared by an expert while under oath is, if you
2 will, a one-sided statement of the story,
3 correct?

4 A. Yes.

5 Q. And that the deposition process is
6 designed in our litigation system to provide an
7 opportunity to cross-examine those opinions and
8 those statements?

9 A. Yes.

10 Q. And would it be fair to say that to get
11 the full picture of Dr. Murray's presentation,
12 you would want to see not only his unilateral
13 statement but you would want to see his
14 statements under cross-examination?

15 A. Yes.

16 Q. Now, you were also given, weren't you,
17 Father, a deposition of another legal ethics
18 expert by the name of William C. Trotter, who
19 Mr. Motley had retained in connection with the

20 Mississippi case. Do you recall that?
21 A. Yes.
22 Q. By the way, have you met Mr. Motley in
23 connection with this case?
24 A. I don't think so.
25 Q. Do you know who he is?

23

1 A. Oh, yeah.
2 Q. You understand he's one of the lawyers
3 for the State of Texas?
4 A. I know well.
5 Q. But have you ever met Mr. Motley?
6 A. I don't think so, no.
7 Q. And you reviewed, I take it, the
8 deposition of Mr. Trotter, correct?
9 A. Yes.
10 Q. Have you met or spoke with Mr. Trotter?
11 A. No.
12 Q. Had you heard of him before?
13 A. Not before this litigation, no.
14 Q. I see. Before reading the deposition?
15 A. Yes -- no.
16 Q. You've got to try to remember to let me
17 finish my question. I know that's hard but we've
18 got to try to remember that for the sake of the
19 court reporter.
20 A. Yes.
21 Q. Let me ask it again. Am I correct,
22 then, that you would have heard of Mr. Trotter
23 from the lawyers before reading his deposition
24 but not before they told you about him?
25 A. Correct, yes.

24

1 Q. Now, and I take it, Father, that there
2 is nothing in the deposition or the statements
3 made by Mr. Trotter in connection with his work
4 as an expert that you disagree with?
5 A. I'm not able to say that right now. I
6 recall reading it but I don't know whether I
7 agree or disagree with it substantially.
8 Q. Let me just put it this way. Having
9 reviewed the deposition, is there anything that
10 sticks in your mind as you sit here today that
11 you disagreed with in the statements that
12 Mr. Trotter made?
13 A. Would you refresh my recollection on
14 what Mr. Trotter actually said?
15 Q. Well, he was the expert witness in
16 connection, as I think we've established, in
17 connection with Mr. Motley's representation,
18 early representation of the State of
19 Mississippi. And you reviewed his deposition,
20 which was, I don't know how many, perhaps a
21 hundred or so pages of testimony. My only
22 question is, is there anything that you can
23 remember from that review that you disagreed
24 with?
25 A. I am not in a position to say I agree

25

1 or disagree. I've read it and I don't have at
2 this moment any distinct recollection of agreeing
3 or disagreeing.
4 Q. Do you have any reason to doubt the

5 accuracy -- well, let me start that over.
6 Mr. Trotter, as with Dr. Murray, did an extensive
7 factual investigation, are you aware of that?
8 A. Yes.
9 Q. And do you have any reason to doubt the
10 accuracy of his report that he's given of the
11 conclusions he reached from his factual
12 investigation?
13 A. Well, I would need a recollection, I
14 need a refreshment of my memory as to what
15 Mr. Trotter actually said.
16 Q. You have no recollection of it actually
17 as you sit here?
18 A. I've read hundreds of thousands of
19 pages so I don't recall at this moment exactly
20 what Mr. Trotter said.
21 Q. And just so we're clear, Father, is it
22 fair to say you've read hundreds of thousands of
23 pages of the material --
24 A. At least thousands, yes.
25 Q. Thousands of pages. You're now

26

1 referring to the materials relating to this case?
2 A. That's right.
3 Q. Now, Father, one of the other
4 depositions you were also supplied with was the
5 deposition of Father Kevin Wildes, is that
6 correct?
7 A. Uh-huh.
8 Q. You need to answer yes or no, Father.
9 A. Yes.
10 Q. And I gather you must know Father
11 Wildes.
12 A. I do.
13 Q. And he's a member of your community?
14 A. That's right.
15 Q. Am I correct that Father Wildes is a --
16 has a joint appointment with the departments of
17 philosophy and the medical school there at
18 Georgetown?
19 A. Yes.
20 Q. And is Father Wildes a respected member
21 of the faculty in those departments?
22 A. I assume so.
23 Q. Would you have any reason to think he's
24 not?
25 A. No.

27

1 Q. And is he a respected expert in the
2 field of bioethics?
3 A. I'm not able to say.
4 Q. Do you have any reason to doubt that he
5 is?
6 A. I don't know.
7 Q. Do you disagree with anything you read
8 in the deposition of Father Wildes?
9 A. He's talking about an area with which
10 I'm not familiar. And I read it and reviewed it
11 carefully and I am simply not in a position to
12 agree or disagree. I am not in that field. I am
13 in legal ethics and he is in bioethics.
14 Q. But understand, Father, that what I am
15 asking you and what I think I'm entitled to know,

16 having read that deposition, is there anything,
17 as you sit here, that you would like to put on
18 the record in the way of a disagreement with
19 Father Wildes?

20 A. I would disagree with his major
21 libertarian premise, that the government should
22 not be involved in regulating these things. I
23 found the deposition quite amorphous. I don't
24 know where he's coming from philosophically, so I
25 would not be in agreement with some of his

28

1 fundamental principles.

2 Q. Putting that aside, you understand that
3 like yourself and like the rest of the people
4 here that are experts, Father Wildes has done a
5 factual investigation, correct?

6 A. Uh-huh.

7 Q. Yes or no?

8 A. Yes.

9 Q. And is there anything about his factual
10 investigation or report on his factual
11 investigation that you have any reason to
12 disagree with?

13 A. I'm not competent in that area.

14 Q. Have you talked to Father Wildes about
15 this case?

16 A. Briefly.

17 Q. When did that happen?

18 A. About a month ago.

19 Q. And did you approach him or did he
20 approach you about it?

21 A. No, it was just casually one night, we
22 were having recreation and I just brought that
23 up. And I didn't disagree with him. We're
24 friends. I just said I was interested.

25 Q. What did you say to him and what did he

29

1 say to you about it?

2 A. People differ. Now, we didn't have any
3 quarrel over it. I just remarked that I read
4 this and he's a libertarian, which he is. And he
5 inherited that from one of his mentors where he
6 got his doctorate.

7 Q. And have you read anything else that
8 was either prepared by Father Wildes or that
9 concerns his testimony in this case other than
10 his deposition?

11 A. No.

12 Q. One of the other documents you were
13 provided, according to the box of materials we
14 were sent, was the deposition of a Thomas
15 Donaldson. Do you remember that deposition,
16 Father?

17 A. Yes, I do.

18 Q. And did you read it?

19 A. I did.

20 Q. Does that deposition form in any way
21 the basis for your testimony here?

22 A. I'm not certain because I read so
23 much. I don't know what forms are the basis.
24 And I'm inclined to think it might have had some
25 impact but once again, I go back to my specialty,

30

1 legal ethics.

2 Q. And you understand that Mr. Donaldson
3 or Dr. Donaldson is a scientific, more scientific
4 type expert?

5 A. That's right. I think I have his
6 testimony here and I have read it and I thought
7 it was impressive.

8 Q. You have his testimony there with you?

9 A. I thought I did. I'm not certain that
10 I do. Go on.

11 Q. Let me just come back to this and
12 you'll see why it's important in a minute.

13 A. I do.

14 Q. Okay. Does that volume of
15 Mr. Donaldson's or Dr. Donaldson's deposition
16 form in any way the basis for your opinions in
17 this case?

18 A. I don't think so.

19 Q. And the reason I asked you that is
20 that, as you may know, that deposition was not
21 completed, that that's not the entire
22 deposition. Were you aware of that?

23 A. I'm not certain.

24 MR. KLOK: But to correct the record,
25 the deposition is completed now.

31

BY MR. McCORMICK:

2 Q. And that's exactly where I was going.
3 Do you understand that the deposition was --
4 well, the fact is that the deposition was
5 completed just this week on Tuesday. Have you
6 seen the second volume?

7 A. I have not, no.

8 Q. And again, in the interest of fairness
9 and seeing the complete story, wouldn't it make
10 sense that you would want to read the whole thing
11 rather than just half of it?

12 A. I want to see it.

13 Q. You do want to see it?

14 A. I do.

15 Q. Now, in your disclosure statement,
16 which we'll come to in a minute -- let me start
17 that question over. Is there any additional work
18 that you have planned in preparation for your
19 testimony in this case?

20 A. What do you mean exactly?

21 Q. Work in the future, work beyond today,
22 from today until the time you testify in the
23 trial, is there any additional work that you are
24 planning to do?

25 A. Well, I simply have to continue to

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1 clarify the basic issues in my fields, namely,
2 the lawyer-client privilege and all of those
3 areas. So I'll keep reading and studying about
4 that.

5 Q. What is it in particular that you plan
6 to keep reading and studying?

7 A. There is a lot of cases coming out and
8 a lot of rulings. I do this all of the time.
9 The ABA BNA manual comes out every fortnight with
10 all types of new rulings at the state level. The
11 ABA furnishes information. So I just keep

12 current on all of these issues.

13 Q. In addition to keeping current on the
14 legal issues relating to lawyer conduct and
15 lawyer ethics, is there anything else that you
16 currently have planned to do between now and the
17 time of trial?

18 A. Not to my knowledge.

19 (Drinan Exhibit No. 1 was
20 marked for identification.)

21 BY MR. McCORMICK:

22 Q. In the disclosure, Father, at the last
23 page, the page number 4 of the disclosure as
24 opposed to your resume, in the last paragraph, it
25 says: The information disclosed or retrieved

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1 through the ongoing disclosure and discovery
2 process may alter the theoretical bases for
3 Father Drinan's opinions. In such an event,
4 Father Drinan may be required to perform a new
5 and independent analysis of his opinions in
6 relation to the entire litigation.

7 Do you see that?

8 A. I do.

9 Q. Did you write this disclosure
10 statement?

11 A. No. It was written in collaboration
12 with counsel.

13 Q. Can you tell me, do you plan -- what
14 this suggests to me, Father, and you correct me
15 if I'm wrong, what this suggests to me is that
16 you or counsel who are working with you on this
17 case anticipate the possibility of you
18 essentially starting from scratch and doing an
19 entirely new analysis of this case.

20 A. I don't take it to mean that. I was
21 comfortable with this paragraph because I'm
22 learning new things every day, I want to be
23 entirely fair to the lawyers involved in both
24 sides and that if I get new information by reason
25 of the -- through the disclosure and discovery

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1 process, I want to be fair to the other side and
2 say, I will change my view. I'm new in this
3 whole vast area of what has happened over 30
4 years and what lawyers have done. I want to keep
5 my mind open and to say that we're going to say
6 what has happened.

7 Q. But as you sit here, I take it, you
8 don't, at this point, anticipate or plan that
9 you're going to be doing a, quote, new and
10 independent analysis of this situation, or do
11 you?

12 A. I don't want to preclude it. To
13 repeat, I've been in this business for years and
14 I am in favor of lawyers. I like lawyers.
15 They're my best friends. And if somebody is
16 going to be charged with unethical improprieties,
17 I want him to get due process and a fair hearing
18 and that's why I'm comfortable with this, that I
19 am prepared to have an open mind.

20 Q. Because charging someone with
21 professional misconduct is a very serious thing?

22 A. It's awful.

23 Q. And for you to lend your name and your
24 testimony and your support to that charge, you
25 would want to be very comfortable with it?

35

1 A. And very clear, very certain.

2 Q. And you would want to, in order to do
3 that, of course, have a full and complete
4 knowledge of all the facts surrounding the
5 circumstances?

6 A. That's why I have read all these
7 thousands of pages.

8 Q. And these situations, these judgments
9 on legal ethics are, you would agree with me,
10 sometimes very difficult and complex legal and
11 factual issues, aren't they?

12 A. I agree.

13 Q. Now, but Father, let me come back to my
14 question because I understood you, the first time
15 you told me, that you don't want to preclude
16 yourself from changing your opinion or reaching a
17 new analysis but my question was not whether you
18 wished to preclude yourself. I understand you
19 don't. My question is, do you plan to do so as
20 you sit here at this point?

21 A. No. Let me correct that. It depends
22 upon the facts. I'm not going to say I won't, I
23 don't intend to. I don't know what I intend. I
24 intend to be fair.

25 Q. But you understand that what I am

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1 asking for here and what I am I think entitled to
2 is if you do have any current plans, I understand
3 things may change in the future.

4 A. I have no current plans.

5 Q. Now, Father, you've mentioned the work
6 you've done in reviewing all these company
7 documents, the testimony of other witnesses, the
8 materials on legal ethics and lawyer conduct.
9 During the course of all of this review you've
10 done, have you prepared notes as you've gone
11 along?

12 A. I've scribbled out some things, yes.

13 Q. And when you say you've scribbled out
14 some things, do you have those with you? You
15 gestured to a notebook?

16 A. I left a lot of them in the office.

17 Q. Do you have a notebook in which you've
18 made these notes?

19 A. Yes.

20 Q. Do you have some of it here?

21 A. Some but not all.

22 Q. Could I see what you have here?

23 A. Well, you won't be able to read them.
24 Why did you want them?

25 Q. Well, I think we're entitled to have

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1 all of the work you've done in connection with
2 this case, including notes you've made.

3 A. Would it be possible for you to send me
4 a letter as to what you would request?

5 Q. Certainly that's possible.

6 A. And I'll go over this mass of papers
7 that I have and send you anything that I can.

8 Q. That's certainly possible. A lot of
9 things are possible. I think I'm also entitled
10 to make the request now for anything that you
11 have with you that is work product in connection
12 with this case.

13 A. I have notes on the actual rules of
14 Texas and then I have notes about something
15 unrelated here.

16 Q. Unrelated to this case?

17 A. Yeah, I know.

18 Q. Is that what you're saying, unrelated?

19 A. Unrelated to this case, yes.

20 Q. Let me put it this way, Father. What I
21 would like to have is any notes that you have
22 that are related to this case.

23 A. Could you make a request for that and
24 I'll put them together? I don't want to give you
25 whatever I have here by happenstance that I

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1 brought, and there are other materials. If you
2 could write the regulation that you're entitled
3 to these things and I would be forthcoming.

4 Q. Father, the only problem is that you're
5 here and I'm here and this is our chance.
6 Ideally everybody would like to get this
7 deposition done. This is our chance to do this.
8 I think we probably should have gotten this
9 material ahead of time to facilitate this but, at
10 a minimum, if you have materials here that you've
11 prepared that are work product in connection with
12 this case, I think that, in all fairness, the
13 defense is entitled to see it and to interrogate
14 you.

15 A. I would feel much happier if I could go
16 through these things and make a copy for myself
17 and send you whatever is here. Some of these
18 things are not going to help you at all. It's
19 just a citation to a case that I haven't followed
20 up on or notes to myself and notes about
21 references to crime/fraud and other things.

22 Q. Father, let me ask it this way. You
23 have some notes that you have with you that
24 relate to either the rules of Texas or other
25 legal decisions or legal matters, correct?

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1 A. Yes.

2 Q. What other notes do you have with you
3 today, putting aside whether I'm going to get to
4 see them or not, relating to this case?

5 A. It's just references to things that I
6 have been reading as to what I should go back and
7 look at. For example, I have here, get material
8 on recall. I also have, read again the Goldstone
9 deposition. Learn something more about punitive
10 damages. These are mostly notes to myself.

11 Q. I understand, Father. Is there
12 anything else that you have -- you're looking at
13 a stenographer's type notebook.

14 A. That's right.

15 Q. Do you have two of them there?

16 A. That's right.

17 Q. Is there anything else besides those
18 two stenographer's notebooks that you have with

19 you today that's work product from this case?
20 A. That's work product? No. I'm afraid I
21 have only the documents -- some of the documents
22 that have been sent to me. These are the
23 documents that were transmitted to me. And some
24 decisions, Haines versus Liggett, and a couple of
25 JAM articles.

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1 Q. Let me come back to my question,
2 though. And I'll come back to the other
3 materials you have. My question is, in terms of
4 your work product, your notes prepared in
5 connection with your work in this case, do you
6 have anything with you today other than the two
7 stenographer's notebooks?

8 A. No.

9 Q. There is another stenographer's
10 notebook on the table here. Does that also
11 contain your notes?

12 A. That's a blank.

13 Q. And back at your office, you mentioned
14 you have other work product notebooks?

15 A. I think I do.

16 Q. Also in the form of these
17 stenographer's pads?

18 A. Sometimes, yes.

19 Q. Are they in other forms as well?

20 A. Not to my knowledge. This is my way.

21 Q. How many other of those pads do you
22 have?

23 A. I can only think of one or two at most.

24 MR. McCORMICK: We, Counsel, request
25 that these be provided to us timely to

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1 interrogate in connection with this deposition.

2 BY MR. McCORMICK:

3 Q. Have you exchanged correspondence with
4 counsel for Texas about this case?

5 A. I certainly have received the letter.
6 Documents. Not so much correspondence.

7 Q. Have you written a report to them?

8 A. Not to my knowledge.

9 Q. You would know if you had, wouldn't
10 you?

11 A. I have not, no.

12 Q. Have you written them any letters
13 discussing your views or opinions or anything
14 else about the case?

15 A. Not to my knowledge.

16 Q. Have you done any other writing about
17 this case other than that which is contained in
18 these stenographer's notebooks?

19 A. I have a short article in the national
20 Catholic Reporter, not about this case but about
21 the problem in general and the proposed
22 settlement of 365 billion. And I say expressly
23 that I don't reveal anything about the tobacco
24 case in Texas and I've revealed my role there.

25 Q. This is an article that appeared in the

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1 National Catholic Reporter?

2 A. Yes.

3 Q. Do you have a copy of it there?

4 A. Yes. You can have that.
5 Q. Thank you. You don't have any work
6 that you've done, I take it, on your computer or
7 your word processor?
8 A. No.
9 Q. Have you kept a record of the time that
10 you've spent in connection with this case,
11 Father?
12 A. Just the hours, yes.
13 Q. And how many hours, do you know?
14 A. It's mounting up but I made an
15 agreement with counsel at the beginning that I
16 don't want any fees. If at the end of all of
17 this they want to give something to the
18 Georgetown Journal of Legal Ethics, they can do
19 so, but that I'm not charging them by the hour.
20 Q. I understand. But in terms of the
21 number of hours, have you kept track of the hours
22 you've spent?
23 A. I have, yes.
24 Q. Do you have that record here?
25 A. I won't say it's complete, and again,

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1 it's undecipherable. I'll be happy to send you
2 this if you want. This is just a rough tally of
3 how many hours I have put in.
4 Q. Does it show what the total is at this
5 point?
6 A. I don't keep the total.
7 MR. McCORMICK: We would request that
8 as well.
9 BY MR. McCORMICK:
10 Q. And I understand that you've discussed
11 with them the issue of, if they wish, they can
12 make this contribution.
13 A. That's right.
14 Q. Have you discussed with them an hourly
15 rate? And when I say rate, I don't mean it in
16 the sense of compensation to you.
17 A. I have not, no.
18 Q. Have you ever given a deposition
19 before?
20 A. No.
21 Q. I take it, though, as a lawyer for many
22 years, you have at least a general familiarity
23 with the process?
24 A. Yes.
25 Q. And you have had the opportunity also,

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1 I take it, to discuss the procedures that we'll
2 be following today and Tuesday with counsel for
3 Texas?
4 A. Yes.
5 Q. And you understand, of course, this
6 you're under oath here?
7 A. Yes.
8 Q. And you understand that during the
9 course of the questioning, you have the right and
10 I believe obligation, which I think you've
11 already demonstrated, that if you have any
12 question about the meaning of my question or
13 you're confused in any way about my question, you
14 will ask for a clarification. Is that fair?

15 A. Yes.
16 Q. Otherwise, we'll proceed on the basis
17 that you understand my question and have answered
18 it to the best of your ability, is that fair?
19 A. Yes.
20 Q. You mentioned, Father, that you had
21 been retained as a consultant to the RTC. And
22 would you describe the nature of that engagement,
23 please.
24 A. It was Morrison & Hecker of Kansas City
25 that came and briefed me and in due course, I

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1 prepared a statement with regard to the lawyers
2 that were involved in Mr. Keating's bank. I went
3 to Phoenix two or three times and consulted with
4 them. The case settled out so that I never
5 really was deposed or appeared as a witness. It
6 was very illuminating. I did a lot of work on
7 the lawyer's role and there were other legal
8 consultants in legal ethics too for the plaintiff
9 in this case.

10 Q. So this was a lawsuit brought against,
11 among other people, lawyers who had been counsel
12 to Lincoln Savings?

13 A. That's right.

14 Q. And where was that case pending?

15 A. Phoenix. Tucson.

16 Q. Do you remember the firm that retained
17 you?

18 A. Morrison & Hecker.

19 Q. And the purpose of your retention there
20 was to give an opinion on the conduct of the
21 lawyers while representing this savings and loan?

22 A. Yes.

23 Q. And did you give such an opinion?

24 A. I did.

25 Q. And what was your opinion?

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1 A. That some of the things that they did
2 were unethical.

3 Q. Was that a written opinion?

4 A. Yes.

5 Q. Other than that retention, have you
6 ever before today been retained as an expert
7 witness?

8 A. In at least five or ten cases that I
9 know. Generally they have settled out but that I
10 try to be helpful to people who call me.
11 However, I decline most of the requests simply
12 because it's complicated and that I have great
13 doubts whether the lawyer did actually do
14 anything unethical. Those cases just die on the
15 phone. But I have been -- I won't say retained,
16 consulted.

17 Q. Five or ten times? You have to answer
18 yes.

19 A. Five or ten times, yes.

20 Q. So these would be consultations on the
21 telephone, for the most part?

22 A. No, they develop into paper. Different
23 ways they develop. I feel strange because all of
24 that is confidential. I don't want to identify
25 the clients in any way.

1 Q. But first let me understand what we're
2 talking about. I understand that people perhaps
3 call you from time to time and you may have a
4 phone conversation with them about it and it
5 never goes anywhere from there. That happens, I
6 take it?

7 A. Yes.

8 Q. But now what I'm interested in is
9 situations where you have been formally retained
10 by counsel in connection with litigation as an
11 expert witness. Has that happened before?

12 A. It has.

13 Q. And how many times other than Keating?

14 A. Five or ten.

15 Q. And in all those cases, were you
16 retained as an expert on the subject of legal
17 ethics?

18 A. Yes.

19 Q. Did any of those retentions involve any
20 of the same lawyers that are involved in this
21 case?

22 A. No.

23 Q. And you've mentioned already that
24 you've never given a deposition. Did you in any
25 of those cases testify at trial?

1 A. No.

2 Q. Have you ever been a witness at trial?

3 A. No.

4 Q. Father, do you have a copy of your CV
5 with you?

6 A. I'm afraid I don't. It was sent to
7 you, I'm sure.

8 Q. It was. Let me just -- and I
9 apologize. I'll have to get some extra copies of
10 this at the break but in your CV, Father, you
11 list a series of publications.

12 A. Yes.

13 Q. And I would be happy to show you this
14 but maybe you can answer it from your knowledge.
15 Do any of the publications listed -- do you have
16 a copy of that in front of you now?

17 A. Yes.

18 Q. Do any of the publications listed on
19 your CV relate to the issue of smoking and health
20 in any way?

21 A. No.

22 Q. Are any of the publications listed on
23 your CV relevant to your testimony here today?

24 A. With one exception, that possibly, in
25 one of my books, the Fractured Dream, there may

1 or may not be a chapter there on smoking. There
2 is 12 or 13 legal/moral problems and I don't know
3 whether smoking is one of them.

4 Q. Is that a book you edited?

5 A. No, I wrote.

6 Q. You wrote all 12 chapters. But you
7 can't remember right now whether tobacco is in
8 there?

9 A. I don't know.

10 Q. Is that the only one that may bear on

11 your testimony in this case?
12 A. No, but there are many, many articles
13 I've written which are not listed here and at
14 least some of them relate to legal ethics.
15 Q. And I want to come back to the articles
16 and to some of them in particular, including the
17 one you've given us today. But with respect to
18 the publication on your CV here, the ones that
19 you've elected to list on your resume, do any of
20 these, with the possible exception of the
21 Fractured Dream, bear on your testimony in this
22 case?
23 A. No.
24 Q. Father, I understand you're currently
25 on the faculty at Georgetown Law School?

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1 A. Yes.
2 Q. And what courses do you teach there?
3 A. Legal ethics or professional
4 responsibility, as it's called, international and
5 human rights, constitution law and sometimes the
6 legislative process.
7 Q. The legislative?
8 A. The legislative process.
9 Q. Are you right now teaching or working
10 anywhere else other than at Georgetown?
11 A. No.
12 Q. Now, again, I've looked at your resume
13 but I want to just go through the chronology here
14 of your career and make sure I've got all the
15 time periods accounted for, if I can. I
16 understand from your resume that you entered --
17 well, you graduated from Boston College in '42,
18 is that right?
19 A. That's correct.
20 Q. And entered the seminary on graduation?
21 A. Yes.
22 Q. Your resume also says that you got a
23 master's from Boston College in '47. Is that a
24 master's in theology?
25 A. Philosophy.

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1 Q. In philosophy. Was your undergraduate
2 degree in philosophy?
3 A. English.
4 Q. You then got a law degree and a
5 master's degree from Georgetown in '49 and '50,
6 is that correct?
7 A. Yes.
8 Q. Did you get a degree in theology along
9 the way?
10 A. After that, 1954.
11 Q. Between 1950 and 1953, what did you do?
12 A. I studied theology.
13 Q. Where did you study theology?
14 A. Both in Boston and in Rome.
15 Q. And did you get a degree?
16 A. Doctorate.
17 Q. And in '54 and '55, you did
18 postdoctorate work in Rome?
19 A. Florence.
20 Q. And from 1956 to 1970, you were at
21 Boston College law school, correct?

22 A. Yes.
23 Q. From 1956 to 1970 while you were at
24 Boston law school, aside from any visiting
25 professorships you may have had, were you
52
1 employed anywhere else during that period?
2 A. No.
3 Q. And then in 1971, as I understand it,
4 you were elected to Congress?
5 A. 1970. I began to serve in '71.
6 Q. And you served in Congress from 1971 to
7 1981?
8 A. Right.
9 Q. And am I correct that in 1981, you were
10 directed by the Pope, through your superior
11 general, to step down from Congress?
12 A. Canon law was changed so that at that
13 time, the Catholic Church decreed that no priest
14 will have any governmental position, if that
15 position has civil power, whether the power is
16 executive, legislative or judicial. So it's a
17 degree, a change of legislation in the church.
18 Q. It wasn't something directed at you?
19 A. No. It was worldwide.
20 Q. But in any event, the Pope issued that
21 decree and under that decree, you were required
22 to step down from Congress?
23 A. It was not really a decree of the
24 Pope. This was a change of canon law that is
25 made at the solemn level.

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1 Q. At which level?
2 A. At the Holy Sea level.
3 Q. But it's a change that would be made on
4 the authority of the Pope, correct?
5 A. Yes.
6 Q. Then from 1981, when you left Congress,
7 you joined Georgetown law school, correct?
8 A. Yes.
9 Q. And that's where you have been -- you
10 have been there ever since?
11 A. Yes.
12 Q. And then again, with respect to your
13 tenure at Georgetown, aside from visiting
14 professorships, have you had any other
15 employment?
16 A. No.
17 Q. So you have never been, I take it, in
18 private practice of law?
19 A. No.
20 Q. Have you ever represented a client as a
21 lawyer?
22 A. Many clients.
23 Q. Explain.
24 A. At least as a consultant. In my years
25 at Boston College law school, I was the president

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1 of the Massachusetts Bar Association and was the
2 chairman of their key committee on the
3 administration of justice. I consulted with any
4 number of groups, particularly nonprofits, about
5 their legal problems. So I am thoroughly
6 familiar with virtually all of the problems in

7 the practice of law.

8 Q. Have you ever represented the Society?

9 A. No.

10 Q. Have you ever represented Georgetown?

11 A. No.

12 Q. Have you ever represented or advised a
13 private corporation?

14 A. Yes.

15 Q. Which ones?

16 A. I don't know whether I should give
17 their name or not but these are corporations that
18 are generally nonprofit or catholic, and I wasn't
19 retained in a formal sense to advise them but I
20 gave, on many, many occasions, all types of legal
21 and moral advice as to what they should do.

22 Q. Are you a member of any bar other than
23 the District of Columbia and Massachusetts?

24 A. No. The U.S. Supreme Court.

25 Q. Now, going back, if you will, to

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1 Exhibit 1, which is a copy of the State of Texas
2 disclosure concerning your testimony, can you
3 tell me when this was prepared, approximately?

4 A. A month or two ago.

5 Q. And you said that you prepared it in
6 collaboration with the lawyers for the State?

7 A. Yes.

8 Q. And who prepared the first draft?

9 A. I'm not certain. This came to me after
10 lengthy discussions.

11 Q. Well, did you sit down from scratch and
12 prepare the draft or did they do that and you
13 commented on it?

14 A. We both did it.

15 Q. And is this disclosure current, Father?

16 A. Very current, yes.

17 Q. In other words, this accurately
18 represents the state of your opinions and your
19 planned testimony as of today?

20 A. Yes.

21 Q. Let me ask you to look, if you would,
22 at the second page, page 2, the first full
23 paragraph there, I want to ask you some questions
24 about the specifics of this.

25 A. Yes.

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1 Q. In the first sentence there -- I'm
2 sorry, if you could go back to page 1 first, the
3 page number 1 with State of Texas expert
4 disclosure at the top.

5 A. Uh-huh.

6 Q. In the third full paragraph, it states
7 that: Father Drinan will testify about the role
8 of the attorney-client relationship and will
9 explain what attorney actions constitute
10 legitimate lawyer activity. Do you see that?

11 A. I do.

12 Q. Now, I want to ask you some specific
13 questions about that but my first question is,
14 can you explain what you mean there by the role
15 of the attorney-client relationship?

16 A. I can explain that by referring to the
17 documents of the American Bar Association and

18 also the rule of Texas. This has been highly
19 developed through the years and it comes out in
20 the specific ethical rules that are cited on page
21 2. In Texas, we have the numbers here, and in
22 the American Bar Association, they're almost the
23 same. And I'm in a position to explain
24 thoroughly what the attorney should be to the
25 client. I'm not certain how long you want this

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1 explanation to be but that it can be wholesome.
2 I teach this on a regular basis and
3 write about this and testify about this and it is
4 very clear what a lawyer can do and can't do,
5 especially in model rule 1.2. A lawyer shall not
6 counsel a client to engage or assist a client in
7 conduct that the lawyer knows is criminal or
8 fraudulent but the lawyer may discuss this. That
9 is very clear that there are some things that a
10 already can't see and it's clear that the
11 lawyer's representation does not constitute an
12 endorsement of the client's political, economic
13 views.

14 There are other very clear and specific
15 things as to what a lawyer may do and may not
16 do. If you want, I can go on and explain.

17 Q. Well, let me just ask you this because
18 I'm going to ask you some questions about the
19 rules governing the attorney-client communication
20 doctrine and I'm going to ask you some questions
21 about the work product, and you mentioned here
22 also very specifically the issue of the
23 crime/fraud exception to the attorney-client
24 privilege. In your first sentence here, are you
25 talking about those three things? When you say

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1 the role of the attorney-client relationship --

2 A. I'm talking about those things and
3 others.

4 Q. And what others would there be?

5 A. Would be is the client in charge or is
6 the attorney in charge and that there are certain
7 things that the client can dictate to the
8 attorney and certain things related to procedure
9 on which the attorney has precedence.

10 Q. All right. Anything else?

11 A. When can a client -- when can an
12 attorney reveal confidential relationships. He
13 can do it in certain cases where his fee has been
14 challenged or not paid and in other restricted
15 circumstances.

16 Q. Anything else?

17 A. I am talking particularly about the
18 fiduciary relationship that exists between the
19 attorney and client and also the fact that the
20 client is the principal and the attorney is
21 merely the agent.

22 Q. Anything else?

23 A. I will demonstrate particularly what
24 actions go beyond the attorney's role. When he
25 becomes, in essence, an accomplice of something

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1 that he knows or should know is fraudulent or
2 criminal. In essence, I will talk about the

3 history of this relationship, its uniqueness in
4 American law and how a lawyer may not become an
5 aide or an abettor of crime or fraud.

6 Q. Anything else?

7 A. Well, I could go on for two hours, if
8 you want.

9 Q. And Father, believe me, we're going to
10 talk about individual issues and your views
11 generally on attorney-client privilege, including
12 the crime/fraud exception, on work product and on
13 the attorney's obligations with respect or
14 limitations with respect to revealing
15 confidential information. But what I'm trying to
16 understand, is there any other aspect of a
17 lawyer's relationship to a client that is
18 relevant to your testimony other than those
19 things?

20 A. I think in order to understand where
21 I'm coming from, we would have to know a good
22 deal about the history of the privilege, the
23 history of the relationship of the
24 attorney-client, indeed the history of the legal
25 profession in America and in England.

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1 Q. As background to all of this?

2 A. Exactly.

3 Q. And I want to get to the background but
4 I also want to understand, a client goes out and
5 hires a lawyer to represent his or her legal
6 interests, right?

7 A. Yes.

8 Q. And that relationship that ensues from
9 that may have many, many aspects to it?

10 A. Yes.

11 Q. And what I'm just trying to understand
12 is what ones are going to be at issue here in
13 this deposition and in your testimony, all
14 right? And what I know we're going to be talking
15 about is the attorney-client privilege, correct?

16 A. Yes.

17 Q. The crime/fraud exception?

18 A. Yes.

19 Q. The work product doctrine?

20 A. Yes.

21 Q. The obligations or restrictions on a
22 lawyer from revealing confidential information?

23 A. Yes.

24 Q. Is there any other part of that
25 relationship that's going to be important here?

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1 A. Yes, the fiduciary nature of the
2 relationship.

3 Q. The fiduciary obligation owed by a
4 lawyer to the client?

5 A. Exactly.

6 Q. Is there any other aspect of it that
7 you can think of as we sit here that will be
8 relevant to this case?

9 A. We're talking about litigation on the
10 civil side and not on the criminal. In a
11 criminal case, it is very clear that everybody
12 has a right to representation, that the
13 government has the obligation of proving beyond

14 every reasonable doubt that this person was
15 guilty and, consequently, a lawyer, in virtually
16 every case, can take a purpose, however heinous
17 the crime or discharge, and give him every
18 benefit of the law. But on the civil side, we
19 have somewhat differing rules where the lawyer is
20 not able to go forward and be a part of the crime
21 or fraud in which the client is engaging.

22 Q. A lawyer in a criminal case can't
23 become part of a crime or a fraud, can he,
24 Father?

25 A. No.

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1 Q. But Father, I want to come back to my
2 question because really there is no hidden hook
3 here. I just want to understand what we're
4 talking about. In terms of the relationship
5 between the client and the lawyer, you are
6 interested and will be testifying about the
7 attorney-client privilege, the crime/fraud
8 exception, the work product doctrine, limitations
9 of a lawyer on revealing confidences, correct?

10 A. Yes.

11 Q. Is there any other aspect of that
12 relationship that is relevant to your testimony?

13 A. I think there is one other, at least,
14 that the lawyer's obligation to his own
15 conscience. And in the model rules going back to
16 1908, it was made very clear that the conscience
17 of the client is not in charge, it is the
18 conscience of the lawyer and that the lawyer must
19 not do, may not do those things that he knows are
20 wrong. And under model rule 3.3, the lawyer may
21 not give evidence to the judge or the jury or any
22 tribunal that he knows they should not accept.

23 Q. Are there any other besides with that
24 addition, any other aspects of the relationship
25 between the lawyer and the client that are

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1 relevant here?

2 A. It is made very clear in one further --
3 in several cases but particularly in one other
4 where in model rule 8.4, it says that the
5 lawyer -- it is professional misconduct for a
6 lawyer to engage in conduct involving dishonesty,
7 fraud, deceit or misrepresentation. And I think
8 that those four words are very relevant to
9 everything that we're discussing here.

10 Let me repeat them. A lawyer may not
11 engage in conduct involving dishonesty, fraud,
12 deceit or misrepresentation.

13 Q. Is there any other aspect of the
14 attorney-client relationship that is relevant to
15 this discussion?

16 A. There probably are in many, many ways
17 that don't come to me at this moment. Relevant
18 certainly is the whole question of the adversary
19 proceeding, how far the lawyer can go, and the
20 whole client-lawyer relationship is involved. We
21 can't just isolate them to a few rules. This
22 goes right back to what a lawyer is supposed to
23 be, that he is a person's advocate but that there
24 are very definite rules as to when advocacy can't

25 go forward, when he is not in a position to

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1 conceal truth or to allow people to be misled.

2 Q. Any other aspect of this, any other
3 specific aspect of this relationship?

4 A. Why is it important to you to bring out
5 every aspect now?

6 Q. Well, Father, I believe I'm entitled to
7 know, in general terms, as I will be to know in
8 specific terms, what your testimony is going to
9 be and that's all I'm trying to accomplish here.

10 A. But in 30 hours of instruction in legal
11 ethics that I give at Georgetown, I can't isolate
12 the lawyer's role to one lesson. The lawyer's
13 role permeates and there are all types of ethical
14 and moral obligations on the attorney, as well as
15 on the client. So I can't say these are the only
16 moral or ethical principles that are relevant to
17 the testimony today.

18 Q. Let me come back to model rule 1.2.
19 You mentioned at the start of this line of
20 questioning that model rule 1.2 relates to the
21 prohibition on a lawyer participating in a crime
22 or a fraud. Do I recollect that correctly?

23 A. That's right.

24 Q. And I believe that you also read a
25 portion from the model rule or paraphrased it

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1 that made it clear that it's entirely appropriate
2 and entirely ethical for lawyers to give advice
3 to clients with respect to conduct which may be a
4 crime or a fraud or to advise clients about
5 conduct which may be a fraud or a crime?

6 A. Yes.

7 Q. That happens every day? That's in part
8 what lawyers are here for?

9 A. They're counselors.

10 Q. Correct. And if somebody comes to me
11 and said, look, I've got this situation, and I
12 ask you this as a hypothetical, Father. If
13 someone comes to me and says, look, I've got this
14 situation, here is a series of events that
15 happened, will you advise me what my exposure or
16 liability is, and as a lawyer, I do a review of
17 the facts and render an opinion that that client
18 has engaged in conduct which could be found to be
19 a fraud or a crime, it's not an ethical violation
20 for me to render that opinion, is it?

21 A. May I finish the rule? The rule says
22 precisely that. Model rule 1.2(d), a lawyer
23 shall not counsel the client to engage or assist
24 a client in conduct that the lawyer knows is
25 criminal or fraudulent but a lawyer may discuss

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1 the legal consequences of any proposed course of
2 action with a client and may counsel or assist a
3 client to make a good faith effort to determine
4 the validity, scope, meaning or application of
5 the law.

6 Q. And again, if I join with a client as a
7 participant in a course of action that is
8 fraudulent, I'm committing the fraud just the
9 same way my client is?

10 A. Yes.
11 Q. And the crime/fraud exception to the
12 attorney-client privilege says that my
13 conversations with my client, while I'm engaged
14 with him in this fraudulent conduct, would not be
15 privileged, correct?
16 A. Correct.
17 Q. But if a client comes to me and says,
18 here is this course of conduct -- I think it says
19 there a course of future conduct.
20 A. That's right.
21 Q. Which I am planning to do, please
22 advise me on what the risks are and if I render
23 an opinion and I say, if you go forward with that
24 course of conduct, you will be exposing yourself
25 to a charge of a fraud or a crime, I haven't

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1 participated by giving that advice in the crime
2 or fraud, have I?
3 A. Not necessarily.
4 Q. If I then go forward and take steps to
5 work with my client to effectuate it, then that
6 might be different.
7 A. Correct.
8 Q. But if I give my legal opinion as to
9 what that course -- the implications of what that
10 course will be, there is nothing in the world
11 wrong with that, is there?
12 A. Except that you are required to advise
13 your client to abide by the lawyer.
14 Q. Assuming I've done that, then I'll
15 fulfilled my obligations as a lawyer?
16 A. Except that under 1.16, there are
17 specific rules as to when you may withdraw.
18 Under confidentiality, you can't reveal that
19 necessarily but that he may -- he shall
20 withdraw. The lawyer shall withdraw when the
21 representation will result in violation of the
22 rules of professional conduct or other law, or he
23 may withdraw and the client persist in a course
24 of action involving the lawyer's services that
25 the lawyer reasonably believes is criminal or

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1 fraudulent, or he may withdraw when the client
2 has used the lawyer's services to perpetuate a
3 crime or fraud. He may withdraw when a client
4 insists upon pursuing an objective that the
5 lawyer considers repugnant or imprudent. He may
6 do all of those things.
7 Q. He may withdraw if he chooses to?
8 A. He could be ethically required to do
9 that and if he does not do that -- well, he may
10 withdraw, despite the fact that he is, under
11 confidentiality, not allowed to reveal why he
12 withdraws. However, the rules also allow for a
13 noisy withdrawal. He could ask for the return of
14 the documents that he prepared on which the
15 client intends to rely. And by the noisy
16 withdrawal, he makes it very clear to other
17 people that something unethical is going on.
18 Q. But by the noisy withdrawal, he's still
19 not allowed to reveal his --
20 A. No.

21 Q. I've still got to finish my question.
22 Even under what you referred to as a noisy
23 withdrawal, he's still not allowed the reveal any
24 attorney-client communications, is he?

25 A. Not unless that is almost inevitable by
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1 the reason that he wants the document back.

2 Q. Now, Father --

3 A. He can't deliberately or intentionally
4 reveal, no.

5 Q. Let me come back to my original
6 question. You've listed a series of times that a
7 lawyer is allowed to withdraw from a
8 representation, correct?

9 A. Yes.

10 Q. But the rules do not require him. The
11 rules say may, rather than will?

12 A. Except in 1.16, the first one, where he
13 must withdraw.

14 Q. He must withdraw if he's being asked to
15 do something unethical?

16 A. He shall withdraw, yes, if he knows
17 that the representation will result in a
18 violation of the rules of professional conduct or
19 other law. The rules of professional conduct.
20 He must withdraw, he shall withdraw, if he is
21 unethical.

22 Q. But I want to come back to my
23 hypothetical. In my hypothetical question,
24 Father, someone comes to me and says, I'm
25 planning this future course of action. It is not

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1 a violation of any ethical rule for me to give my
2 opinion on whether that course of action
3 constitutes actionable fraud, is it?

4 A. You're reciting the rule.

5 Q. So I'm correct?

6 A. Yes.

7 Q. So since it's not impermissible under
8 the rules, I can go ahead and render that advice
9 consistent with the normal role of a lawyer?

10 A. Unless this violates some professional
11 conduct.

12 Q. And in my hypothetical, simply
13 rendering the advice on what that future course
14 of conduct would be would not --

15 A. Assuming that the advice doesn't
16 constitute a violation of a rule of professional
17 conduct.

18 Q. But assuming my advice is based on a
19 due diligence and is given on a good faith belief
20 that it's correct as to the facts and the law,
21 then I'm free to render that advice, correct?

22 A. Assuming that you think the client is
23 in good faith and that he is in a position to
24 accept that advice.

25 Q. No, Father, where does the rule say

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1 that?

2 A. If you know that this client is engaged
3 in a pattern of fraud and crime, if you know that
4 your participation in a violation of the rules of
5 professional conduct, you may withdraw. It's

6 unclear whether you can reveal this. But it
7 depends upon each circumstance.

8 Q. Father, I understand the point, that I
9 am required under the rules to withdraw if in
10 fact my conduct -- the conduct I'm being asked to
11 do constitutes an ethical violation. That's
12 pretty obvious. I understand that.

13 A. Yes.

14 Q. My question is, if I am simply
15 rendering my professional judgment in good faith
16 on what the implications are on a future course,
17 that, in and of itself, does not violate any
18 ethical rule, does it?

19 A. Once again, sir, it depends upon the
20 circumstances. It depends upon what you think
21 this client is going to do. If you know that
22 this is nugatory, there is no way by which he is
23 going to follow this, he wants your help to go
24 forward in a pattern of crime or fraud, you can't
25 give him a nice warning and say, I'm going to

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1 stay in the case. You know if you stay here that
2 you are condoning this, you are opening yourself
3 up to 1.16, you should have withdrawn when you
4 knew that this was a pattern.

5 Q. Father, I don't understand why I can't
6 get you the answer my question here. I'm not
7 talking about, in my hypothetical, any
8 participation in the future with respect to this
9 course. Do you understand that? I am simply
10 asking you, if a client comes to me and says,
11 this is the course of action I plan to take, I
12 want to know what my risks are. That's a
13 question that clients ask lawyers every day,
14 isn't it?

15 A. Yes.

16 Q. That's one of the most common reasons
17 we have lawyers in the world is to advise people
18 on the risks of going forward?

19 A. Yes.

20 Q. That's the staple of lawyers who
21 represent, whether it be the Society of Jesus or
22 whether it be a corporation, whether it be inside
23 lawyer or whether it be outside lawyer, isn't it?

24 A. Yes.

25 Q. And if somebody comes to me and I say,

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1 in that thing, look, if you go forward with this
2 conduct, in my opinion, my professional opinion
3 is that you would open yourself up to a charge of
4 wrongdoing, giving that advice is not wrong.
5 That's the normal thing lawyers do, isn't it?

6 A. I agree.

7 MR. CLARKSON: Counsel, we've gone for
8 an hour and 15 minutes. I think it's time to
9 take a break.

10 MR. McCORMICK: Of course. And Father,
11 I should add on the record, before we do this,
12 that at any point during the course of the
13 deposition you wish to take a break, feel free to
14 ask.

15 THE WITNESS: All right.

16 (Recess.)

17 BY MR. McCORMICK:

18 Q. Father, in the course of your work
19 here, you've spent, obviously while you don't
20 know the precise number, many hours and many
21 hours of reading and talking and studying the
22 history of the tobacco industry, correct?

23 A. Yes.

24 Q. And this, as you've pointed out before,
25 is not the first time that you've been involved

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1 in smoking and health issues, correct?

2 A. Yes.

3 Q. You've gone back in terms of your
4 public statements and your writing and your
5 involvement as an legislator on these issues for
6 many, many years, correct?

7 A. Correct.

8 Q. And in the course of that, you've also
9 become aware, at least in connection with your
10 work in this case, of the involvement of the
11 lawyers in the tobacco industry?

12 A. I have.

13 Q. And you understand, don't you, Father,
14 from your work in this case and your knowledge
15 generally, that the tobacco industry has been the
16 subject -- the tobacco industry generally has
17 been the subject of an essentially unlimited
18 barrage, uninterrupted barrage, I should say, of
19 litigation over the effects of its product for
20 over 40 years, since back in the early 1950s?

21 A. Yes.

22 Q. And that that litigation, which began
23 in 1953 or 1954, resulted from what was in effect
24 a firestorm of activity of public controversy
25 over scientific tests that were perform at

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1 Washington University in St. Louis and elsewhere
2 in which the scientists involved contended that
3 those tests showed a possible relationship
4 between smoking and cancer, correct?

5 A. Yes.

6 Q. And that some of the companies, not all
7 of them in the industry but some of the companies
8 have, since that time, been the subject of
9 literally hundreds of lawsuits filed by
10 individual smokers as well as class actions and,
11 more recently, the states over the effects of
12 their product?

13 A. Yes.

14 Q. And would it be fair to say that of all
15 the legal industries in the United States during
16 that 40-plus years or so since the early 1950s,
17 there has probably been done, during that whole
18 period of time, that's been subject to the same
19 level of barrage of litigation against it?

20 A. I'm not certain of that.

21 Q. Is there any other that you can think
22 of at the moment?

23 A. Yeah, auto industry, types of safety
24 devices. Oh, no. People have been litigated
25 against.

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1 Q. But certainly the amount of litigation

2 that's been filed against the industry, and
3 particularly back starting in the early 1950s and
4 continuing forward, has been substantial by any
5 measure?

6 A. There has been substantially against
7 all types of people, asbestos, agent orange, the
8 breast implants.

9 Q. And with respect to all of those, it's
10 not going to be any surprise to anybody, whether
11 it be automobiles, agent orange, breast implants,
12 asbestos, tobacco, it shouldn't be any surprise
13 that those industries are going to go out and
14 hire substantial numbers of lawyers to represent
15 them in that litigation, correct? You have to
16 answer yes or no.

17 A. That's very clear but that doesn't mean
18 that the lawyers for tobacco can be assimilated
19 with all those other groups. I think that it has
20 become clear, in my opinion, in public opinion,
21 and in the public health community, that tobacco
22 is different.

23 Q. I understand that, Father, and we're
24 going to get to exactly the ways in which it's
25 different, and believe me, I'm going to give you

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1 an opportunity to specify exactly how the lawyers
2 for the tobacco industry differ from the way that
3 other industries have conduct themselves.

4 My question to you now is, it's no
5 surprise -- it should be no surprise to anybody
6 that tobacco, like any of these other industries
7 that have had a lot of litigation, would hire
8 many, many lawyers to represent them in that
9 litigation?

10 A. It's a surprise but a disappointment.

11 Q. It's a disappointment that it had to
12 happen, correct?

13 A. That lawyers took the cases.

14 Q. Well, if you are hired to represent --
15 are you saying, Father, that it would be
16 unethical if someone filed a lawsuit against a
17 tobacco company contending that their smoking
18 caused cancer, that it would be unethical to
19 accept that representation?

20 A. No.

21 Q. It would be perfectly appropriate and
22 within the normal conventional role of a lawyer
23 like myself or any other lawyer to accept the
24 defense of a tobacco company whose product was
25 being attacked, wouldn't it?

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1 A. It depends on what that defense is. If
2 that defense is indefensible to the lawyer, then
3 there is an ethical problem.

4 Q. Father, I could then conduct that
5 defense in some way that violated the ethical
6 rules, and we're going to talk about that, but my
7 question is simply this. By taking on the
8 defense and conducting myself within the rules of
9 ethics and within the rules of procedure and
10 within the rules of law, is there anything wrong
11 with representing a tobacco company under those
12 circumstances?

13 A. So long as you follow the rules of
14 legal ethics.

15 Q. So we're agreed on that. And you're
16 not saying that just by taking on the
17 representation of a tobacco company in a smoking
18 and health case, that a lawyer has violated any
19 rule just by doing that, are you?

20 A. It's getting close. But I'm not saying
21 per se objectively ahead of time that these
22 lawyers are violating ethics. However, in the
23 legal community, there is a growing feeling that
24 there are certain cases that are indefensible and
25 that one of the reasons why people think so

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1 poorly of lawyers is that they'll take these
2 cases regardless of what they think of the
3 merits.

4 Q. So your opinion is that a lawyer should
5 only take on a case if they believe in the
6 merits?

7 A. I didn't say that.

8 Q. That's what it sounded like you said.

9 A. No.

10 Q. What am I misunderstanding?

11 A. All I said is that if the defense of
12 this particular practice by an overwhelming
13 amount of evidence becomes unattractive or
14 indefensible to the lawyer, at that point, he
15 should examine his own conscience.

16 Q. And again, Father, I know you want to
17 keep coming back to that but my question is much
18 narrower. We're going to get to the conscience
19 in a minute. My question is, when a company, any
20 company, including tobacco, is attacked in a
21 courtroom, the product is attacked as having
22 caused a particular person's cancer, that
23 company, which is a legal business in the
24 United States, has every right to go out and hire
25 a lawyer to represent its interests in the

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1 courtroom, correct?

2 A. Not in the way the tobacco industry has
3 done it in this country. They have made it clear
4 they will litigate to the end, that they will do
5 anything necessary in order that no conviction or
6 no suit ever reach -- and I have followed this
7 intensely and closely. And I know the law firms
8 involved and I've talked with people and that
9 they have said, we're not going to abide by the
10 rules, that we're going to make it very clear
11 that we're going to appeal against these people
12 and that we're going to use every legitimate
13 device to complete this claim. I have problems,
14 as you can see.

15 Q. You don't think that that's a correct
16 position to take?

17 A. I think as practiced by the tobacco
18 industry, it has not been ethical in all
19 circumstances.

20 Q. It's not been unethical in all
21 circumstances either, has it, Father?

22 A. It hasn't been unethical in all
23 circumstances, I would agree.

24 Q. So I just want to come back now to my
25 fundamental proposition. You would not dispute

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1 that some of the cases in which tobacco companies
2 have been represented by lawyers in various law
3 firms around the country, including mine,
4 including other law firms, you wouldn't dispute
5 that in various of those cases, the lawyers for
6 the defense have conducted themselves entirely
7 appropriately so far as you know?

8 A. I'm not able to agree with that.
9 That's a very sweeping generalization and I'm not
10 prepared to give absolution to all of the
11 lawyers, or even to most of them.

12 Q. I'm not even asking you for your
13 absolution. I'm asking you, as you sit here
14 today, you don't have evidence as to the vast
15 majority of these individual cases that have been
16 tried one way or the other, do you, Father?

17 A. Let me go back to the ethical norm in
18 Texas. This is 1.5(e). When a lawyer has
19 confidential information clearly establishing
20 that a client is likely to commit a criminal or
21 fraudulent act that is likely to result in death
22 or substantial bodily harm to a person, the
23 lawyer shall reveal confidential information, to
24 the extent revelation reasonably appears
25 necessary to prevent the client from committing

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1 criminal or fraudulent act.

2 Now, I assume that in some of these
3 cases, the lawyer would have to know that the
4 tobacco company continues to sell tobacco and
5 that the overwhelming consensus of the public
6 health community says that tobacco is going to
7 hurt individuals. Is he not, therefore,
8 sometimes required to say no, I am not going to
9 go forward with this case that would allow you to
10 continue to sell tobacco?

11 Q. You say sometimes required.

12 A. I'm not sitting in judgment on all of
13 them. I'm not saying that all of the ten top
14 firms representing the tobacco industry are doing
15 unethical things. I'm just saying some of those
16 firms representing the tobacco industry could be
17 wrong. Consequently, I'm not agreeing with your
18 broad statement that they can go out and
19 represent the tobacco industry.

20 Q. I was trying to make my statement
21 narrow so let me try again and trying to avoid
22 the broad, general statement. You would agree,
23 as far as you know, and I'm not asking you to
24 reach an opinion as an expert one way or the
25 other because I don't believe you have the facts

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1 but you would -- let me start that over.

2 You're saying that sometimes a lawyer,
3 simply asked to take on a case, an individual
4 case of a person suing because they claimed they
5 were injured by that lawyer's product, sometimes
6 a lawyer would have to decline that
7 representation and sometimes they wouldn't, am I
8 understanding you correctly?

9 A. Yes.
10 Q. Under what circumstances would they
11 have to decline it and under what circumstances
12 would they be permitted to accept it?
13 A. That if they know that this particular
14 client does in fact have overwhelming medical
15 evidence that cigarettes cause his or her
16 illness, I would think that a lawyer for a
17 tobacco company would urge his client, well,
18 maybe you should settle.
19 Q. And what if a settlement wasn't
20 possible, despite every effort by the tobacco
21 company client?
22 A. You mean they wanted to go and
23 litigate?
24 Q. Right.
25 A. Well, maybe they should say, I'll go

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1 and litigate for you but that I'm not certain
2 that I can give you every defense that you want
3 because some of those defenses are inaccurate.
4 Q. The lawyer can't violate the rules?
5 A. No. And the lawyer could say, I am not
6 intellectually or morally equipped to give you
7 every benefit of the defense that you want.
8 Consequently, you should seek another lawyer.
9 Many law firms have come to that conclusion, as
10 you know. Hundreds of law firms won't take
11 tobacco cases.
12 Q. So if I, however, accept the
13 representation on the condition that I will
14 conduct that defense 100 percent within the rules
15 of ethics and the rules of procedure and all
16 other rules of law, you would have no criticism
17 of that, would you?
18 A. I would have criticism because who is
19 going to be your witness to say that cigarettes
20 don't cause lung cancer? If you get a witness,
21 is he plausible, is he credible?
22 Q. So even under those circumstances, you
23 think that it would not be proper for the lawyer
24 to accept the case?
25 A. I'm not making a broad generalization.

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1 I'm not condemning them all. All I'm saying is
2 he has many ethical hoops to go through and I'm
3 wondering whether he can do that.
4 Q. Have you reached the conclusion as an
5 expert in this case that he cannot?
6 A. At least under the circumstances in the
7 tobacco industry where the lawyers did something
8 far above what they're supposed to do, namely,
9 covering up scientific evidence, abusing the
10 attorney-client privilege, that's my only thing
11 in this case, that I say that these lawyers under
12 these circumstances violated the ethical rules.
13 And above and beyond that, I'm not a legal expert
14 but I am an expert in that area.
15 Q. Today you understand that right now,
16 going on all around the country, individual
17 lawyers, as they have been for 40 years, are
18 being filed against the tobacco industry?
19 A. I know, yes.

20 Q. Contending that the use of tobacco
21 caused disease.
22 A. Yes.
23 Q. And your position would be, then, given
24 all of the circumstances that you've learned
25 about, that it would be ethically wrong for

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1 lawyers to accept those representations?
2 A. No, there may well be exceptions, that
3 if you conclude that in this particular case,
4 this plaintiff did not get cancer from tobacco,
5 you could make a plausible argument that it was
6 from something else, that it was from a bad diet
7 or heredity, you could make that argument. But
8 when it is clear that this person has
9 overwhelming evidence that it was the smoking
10 over a period of years that did in fact lead to
11 this result, I wonder what kind of experts you
12 can acquire to say that, oh, no, there is really
13 no causation.

14 Q. Well, why do you assume that someone
15 would call an expert to say that?

16 A. You need the experts, you need to rebut
17 the experts of the other side.

18 Q. What if I called an expert, Father --
19 have you ever represented a lawyer in a trial,
20 Father?

21 A. No, not in an actual trial but I've
22 represented a lot of lawyers to vindicate them
23 against false charges.

24 Q. Have you ever represented a client in a
25 trial conducted at trial as a trial lawyer?

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1 A. I think that's irrelevant.

2 Q. Okay, but the answer --

3 A. I'm an expert in legal ethics.

4 Q. I understand. But I would like the
5 answer to my question. Have you ever conducted a
6 trial on behalf of a client?

7 A. You've asked that before.

8 Q. And the answer was no?

9 A. Yes.

10 Q. So let me come back. If I call an
11 expert to say this person, not an expert but I
12 presented evidence to show that this person was
13 fully informed as to all of the health risks
14 associated with smoking and made his or her own
15 choice and if the facts supported me, would there
16 be anything unethical about my putting on that --

17 A. There would because it was almost
18 impossible, until very recently, to be fully
19 informed about the evils of tobacco. Even the
20 Surgeon General was misled in 1965. He said
21 that. There has been an attempt, sometimes done
22 by lawyers, to conceal information, to prevent
23 that information from getting out. I've known
24 for 30 years about the alleged dangers of smoking
25 and it's not until the last few years that

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1 finally people say that this is a product which,
2 if used according to its basic purpose, is
3 dangerous.

4 Q. We'll come back to that point, Father,

5 but I want to come back to the representation,
6 then, the issue of representation. With respect
7 to the smoking and health cases that are being
8 filed today against the tobacco companies, then,
9 your position would be that it would be the
10 exceptional case where a lawyer can take that
11 representation on in good conscience?

12 A. Yes.

13 Q. Now, let's go beyond the tobacco
14 industry for a while, Father, and let me just try
15 to understand your basic positions, putting aside
16 the tobacco industry, and we'll come back to that
17 in a minute. Generally speaking, the traditional
18 role of a lawyer in our society is to represent
19 clients who are charged with wrongdoing in
20 lawsuits, correct?

21 A. Yes.

22 Q. And there is nothing inherently wrong
23 in doing that, obviously?

24 A. No.

25 Q. In fact, that's one of the highest

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1 roles of the lawyer as an advocate back since the
2 Greek political orders?

3 A. I agree.

4 Q. And similarly, Father, would you agree
5 that companies who are subject to regulation by
6 government agencies like the Federal Trade
7 Commission, that it's an entirely appropriate, as
8 a general matter, an entirely appropriate role
9 for lawyers to represent companies where a
10 government agency is considering or attempting to
11 impose regulations?

12 A. Yes.

13 Q. And the government agency, like
14 everybody else in America, is supposed to act
15 under the rule of law, correct?

16 A. Yes.

17 Q. And a company has a right to challenge
18 a government agency in imposing regulations on
19 them if they believe that that is not appropriate
20 under the rule of law?

21 A. Yes.

22 Q. Similarly, once a government agency has
23 imposed regulations on an industry, whatever that
24 industry might be, it's an appropriate role,
25 isn't it, for lawyers to advise and represent

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1 that company with respect to complying with those
2 regulations?

3 A. Yes.

4 Q. With respect to -- and when I say
5 legislation, sometimes legislation comes from
6 government agencies and, as you know, sometimes
7 legislation comes from the United States
8 Congress, correct?

9 A. Uh-huh.

10 Q. The answer is yes?

11 A. Yes.

12 Q. And similarly, if Congress is going to
13 impose restrictions or regulations on an
14 industry, it's an appropriate and conventional
15 and perfectly normal role for lawyers to work

16 with a client to represent their legal interests
17 in connection with an effort by Congress to
18 impose restrictions on them, correct?

19 A. Not always.

20 Q. Under what circumstances would it not?

21 A. When the tobacco industry has
22 deliberately withheld fundamental information
23 about the addiction, I don't think that you can
24 say in this case, it's the same as regulating
25 aspirin.

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1 Q. And I understand, you've made it very
2 clear now and I've tried to make it clearer that
3 we're not talking about tobacco. We'll come back
4 to tobacco. We'll come back to aspirin and we'll
5 come back to addiction. But generally speaking,
6 putting the tobacco industry aside, generally
7 speaking, it's an appropriate role for lawyers to
8 help their clients and protect their clients'
9 legal interests when Congress wants to impose a
10 restriction on them?

11 A. Aside from the tobacco industry, and I
12 repeat that, aside from the tobacco industry,
13 what you're saying is boilerplate law.

14 Q. Intellectual property, companies have
15 patents and trademarks, intellectual property
16 that is a property right under our system and
17 it's also traditional that lawyers are involved
18 with a company on behalf of making patent
19 applications and disclosures to the public of
20 patentable information and protecting their
21 client's intellectual property, correct?

22 A. Yes.

23 Q. Have you studied or taught antitrust
24 law, Father?

25 A. Taught what?

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1 Q. Antitrust law.

2 A. No, because I know a lot about that
3 because I was on the house judiciary committee
4 for ten years and we did a lot of updating on
5 that law.

6 Q. Do you understand, then, that if you go
7 back in the history of our country to the trusts
8 in the early century, that one of the trusts that
9 was busted or broken up back early in our century
10 was the tobacco trust?

11 A. 1910.

12 Q. Just as there had been an oil trust and
13 railroad trust and a lot of other trusts, is that
14 correct?

15 A. Yes.

16 Q. And that as recently as the 1930s, the
17 tobacco operated, I believe it was the 1930s,
18 under a consent decree, an antitrust consent
19 decree?

20 A. Yes.

21 Q. And would you agree that it is an
22 appropriate role of lawyers to advise clients
23 with respect to whether their conduct may or may
24 not violate the antitrust laws and compliance
25 with consent decrees and other matters with

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1 respect to the antitrust laws?

2 A. Yes.

3 Q. Now, Father, obviously you understand
4 that the sale of cigarettes is a legal business
5 in the United States?

6 A. Yes.

7 Q. And it has been for many, many years?

8 A. Yes.

9 Q. I think you also are aware, because you
10 wrote about this once, and we'll come back to
11 this a little later, but you're also aware that
12 that wasn't the case, correct?

13 A. I'm not certain what you mean.

14 Q. That there was a time, from around the
15 turn of the century until shortly after the First
16 World War, when a number of states outlawed the
17 sale or use of cigarettes?

18 A. Yes.

19 Q. And that those laws were taken off the
20 books in the years shortly following the First
21 World War, correct?

22 A. Yes.

23 Q. Did you know that the reason that that
24 happened was that the American soldiers who
25 fought in the First World War and many of them

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1 had begun smoking in Europe and came home and
2 found it kind of strange that they had gone to
3 fight for democracy and then they came home and
4 couldn't smoke cigarettes in their own backyard?

5 A. I don't see how this is relevant.

6 Q. Had you ever heard that before?

7 A. I'm not certain, no.

8 Q. In any event, since sometime shortly
9 after the First World War, it's been legal in
10 every state of the Union and in the District of
11 Columbia to sell and use cigarettes?

12 A. Yes.

13 Q. You don't have any problem with that,
14 do you?

15 A. I do.

16 Q. You think it should not be legal?

17 A. I'm not certain of that. It's very
18 difficult to prohibit things. But when a
19 substance is inherently dangerous, the government
20 takes action. When it is an addicting substance,
21 it is banned, like marijuana and other
22 addictions. And I think that there is a case
23 that the government should act for this major,
24 major public health menace. This is not my
25 opinion. This is the opinion of the American

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1 Medical Society, American Cancer Society, the
2 Lung Society and the Attorneys General, the whole
3 public health community. And indeed, all of the
4 trustees of the American Medical Association --
5 some legally -- said in the recent past,
6 something should be done to stop, to inhibit, to
7 discourage. I don't know whether a ban would
8 work. It didn't work in prohibition. All I can
9 say is the mere fact that this is permitted
10 legally doesn't convince me that this is a good
11 thing and that lawyers don't have some

12 obligation.

13 Q. I wasn't asking you about the lawyers
14 here, Father. I was asking your position on
15 whether you believe that tobacco ought to be a
16 legal product in the United States and I'm not
17 sure you answered my question.

18 A. I think that to ban it outright might
19 not be feasible. Millions of people have this
20 addiction. But that you can put all types of
21 restrictions on it so you cut back on the number
22 of people who give in to this addiction.

23 Q. But you believe -- and you've thought
24 about this a lot, haven't you, Father?

25 A. For years.

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1 Q. It's your position as you sit here,
2 though, that while there should be restrictions,
3 it ought to be remain a legal product in the
4 United States, is that correct?

5 A. Simply because -- I don't want to
6 condone it but simply because a total prohibition
7 would not really be feasible. It's not
8 workable.

9 Q. And isn't that because in a free
10 society, and we are supposed to be a free
11 society, correct?

12 A. Yes.

13 Q. In a free society, such outright
14 government paternalism is traditionally and
15 rightly viewed with apprehension? Those are your
16 words and those are correct, aren't they?

17 A. If I may ask the source.

18 Q. Of course.

19 A. Is that in the book from the -- is that
20 from the book that I mentioned?

21 Q. No, it isn't.

22 (Drinan Exhibit No. 2 was
23 marked for identification.)

24 THE WITNESS: I had forgotten entirely
25 about this article. Where was it published?

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1 BY MR. McCORMICK:

2 Q. I was hoping you could tell me,
3 Father.

4 A. September 1980, is it?

5 Q. Yes.

6 A. I don't even identify the magazine.

7 Q. Well, the magazine is identified in the
8 lower left-hand -- if you'll look on the third
9 page of the exhibit -- and let me just say for
10 the record, I have given Dr. Drinan and has been
11 marked for identification as Drinan Exhibit 2 is
12 a copy of an article entitled Government Must Act
13 on Smoking Problems by Robert F. Drinan. And
14 Father, if you'll look on the third page of the
15 document under the copy of the photograph, it
16 says published in engage/social action September
17 1980. Do you see that?

18 A. I do, yes. Thank you.

19 Q. And if you'll refer back to the first
20 page of the exhibit, in the second paragraph
21 there, Father, you give a little thumbnail
22 history of --

23 A. Of the Bolstead, yes.
24 Q. And also, you make a reference in that
25 paragraph to the 14 states that banned smoking
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1 around the turn of the century. Do you see that?

2 A. Yes.

3 Q. And then did you write in this article,
4 quote: In a free society -- you then go on to
5 say that: Prohibition clearly is not an
6 appropriate method in any effort to discourage
7 the cigarette habit. In a free society, such
8 outright government paternalism is traditionally
9 and rightly viewed with apprehension.

10 (Witness confers with counsel.)

11 THE WITNESS: I would prefer to read
12 this. This is a long time ago. And even if I
13 obviously wrote this at that time, I've learned
14 an awful lot since 1980.

15 BY MR. McCORMICK:

16 Q. I understand.

17 A. And that I may not believe that now.

18 Q. And you're of course free to refer to
19 any parts of the article. In fact, I would like
20 to refer you, I will a little bit later on refer
21 you to some other parts. But right now, and
22 regardless of the words of the article, Father,
23 do you still, as you sit here today in 1997,
24 believe that in a free society, the outright
25 government paternalism of a ban on cigarettes
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1 would be rightly viewed with apprehension?

2 A. I would be much less sweeping. Clearly
3 they should not be sold to anybody who is a
4 minor. And I assume that I said that. But
5 that -- I don't know. People are becoming so
6 desperate to do something that perhaps we should
7 consider an outright ban on this dangerous
8 substance.

9 Q. Now, Father, let me return, if I can,
10 to the -- and we'll come back to some other parts
11 of this article in a few minutes but I would like
12 to return, just to finish up some questions about
13 the standards under which lawyers operate here.
14 Do you know where this case is pending?

15 A. Where the case is?

16 Q. Where the case is pending, in what
17 court.

18 A. In Texarkana?

19 Q. Yes.

20 A. In Federal District Court in Texas.

21 Q. And you understand that's in the Fifth
22 Circuit?

23 A. Yes.

24 Q. And are you familiar with the Fifth
25 Circuit precedent and case law concerning the
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1 role, the lawyer's role and obligation with
2 respect to the defense of a client?

3 A. I'm not certain.

4 Q. Are you familiar with a case, the Fifth
5 Circuit decision of U.S. against Cavin,
6 C-a-v-i-n?

7 A. What does it say?

8 Q. My first question is, does that name
9 ring a bell to you?

10 A. No.

11 Q. You don't believe that that's one of
12 the cases you've looked at?

13 A. I'm not certain.

14 Q. Well, are you aware that under the
15 controlling Fifth Circuit precedent, as well as
16 presumably the precedent in other federal
17 circuits, that a lawyer is obligated to give
18 zealous representation of his or her client as a
19 basic tenet of our system?

20 A. That's clear from the model rules.
21 Zealous advocacy.

22 Q. The lawyers who are involved in this
23 representation of this legal product, and
24 regardless of what your view is as to perhaps
25 what should have happened, we all agree it is a

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1 legal product today, correct?

2 A. Apparently it is.

3 Q. And by the way, Father, this is a
4 product that is not only legal to sell, it's not
5 only a legal business to sell cigarettes but
6 that's a business in which the various states of
7 our United States have participated very
8 actively, isn't that true?

9 A. The states participated in what case?

10 Q. In the business of cigarettes.

11 A. They taxed them, yes.

12 Q. Well, they taxed them in the form of an
13 excise tax, correct?

14 A. Yes.

15 Q. And through that excise tax, these
16 individual states, as is true of the Federal
17 Government, have obtained substantial revenues
18 touring the last 40 years and before that as
19 well?

20 A. Yes.

21 Q. And the states do more than just tax
22 them, they also license the sale of cigarettes in
23 their state?

24 A. Yes.

25 Q. And they collect license fees from

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1 people who distribute cigarettes?

2 A. Yes.

3 Q. Some of our states of the United States
4 have actually manufactured their own cigarettes
5 and sold them to people in their prison systems,
6 haven't they?

7 A. I think so.

8 Q. Some of the states of our United States
9 have grown tobacco and sold tobacco, correct?

10 A. Yes.

11 Q. Some of the states of our
12 United States, in fact many of them, have
13 invested very heavily in the stocks of tobacco
14 companies, correct?

15 A. Not Massachusetts anymore.

16 Q. Massachusetts did for a long time,
17 didn't they?

18 A. Everybody makes mistakes.

19 Q. Well, they didn't give back any of the
20 profits from those investments, did they?
21 A. I'm not certain.
22 Q. And in fact, many of them,
23 Massachusetts may be an exception, right up to
24 this day invest heavily in tobacco stocks?
25 A. Yes.

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1 Q. Some of these same states that have now
2 jumped on the bandwagon of filing these lawsuits
3 against the tobacco industry, correct, Father?
4 A. What does that prove?
5 Q. I want to ask you about that. Father,
6 you are an antismoking advocate, correct? You
7 are against smoking and you're an outspoken
8 person?
9 A. No, I'm a person on the sidelines who
10 looks at the experts in the public health
11 community and I have the highest respect for all
12 of those people that I mentioned before, the
13 Surgeon General and the AMA and the Lung and the
14 Heart Association. I'm not an advocate. I'm
15 just saying these people are entitled to be
16 heard, and they are being heard.
17 Q. But regardless of your view on the
18 cigarette industry and regardless of your view on
19 smoking, Father, whatever that might be, doesn't
20 it make you a little bit uncomfortable, the
21 hypocrisy of these states who have licensed and
22 taxed and participated in this business for
23 decades and decade suddenly turning around and
24 suing the tobacco companies?
25 A. Because now they know that tobacco had

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1 concealed this information and now they know
2 things we didn't know 20 years ago, ten years
3 ago.
4 Q. When did they learn those things?
5 A. In the recent past, from all types of
6 things, from the hearings on the Hill, Waxman's
7 hearing, from the Surgeon General's updated
8 report in 1988 and after that. It's just an
9 explosion of information.
10 Q. The hearings on the Hill you're
11 referring to are the Waxman hearings in early
12 1994, correct?
13 A. Correct.
14 Q. And in fact, the first lawsuit of this
15 by these states was filed by the State of
16 Mississippi in 1994, correct?
17 A. Correct.
18 Q. That was three years ago, is that
19 right?
20 A. Yes.
21 Q. In that three years since this
22 explosion of information has occurred, Father,
23 how many of those states have ceased licensing
24 the sale of cigarettes in their state? How many?
25 A. I don't know.

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1 Q. In round numbers, you would not be
2 surprised to hear the answer is zero, would you?
3 A. I don't know what this is leading to.

4 Q. Well, don't worry about what it's
5 leading to, Father. I'm trying to test, as I
6 think I'm entitled to, your knowledge about the
7 circumstances and I'm trying to test the answer
8 you gave me a minute ago. Has any state, to your
9 knowledge, since this, as you put it, explosion
10 of information, stopped licensing the sale of
11 cigarettes in their state?

12 A. Not to my knowledge.

13 Q. Has any state, since this explosion of
14 information, prohibited the sale of cigarettes in
15 its state?

16 A. Not to my knowledge. Many states have
17 increased the tax, however.

18 Q. And states were free to do that at any
19 time, correct?

20 A. Yes. But the politicians wouldn't do
21 it because there are so many smokers out there
22 that wouldn't like this.

23 Q. That's what's known as the democratic
24 process, right, Father? Is that right?

25 A. Yes.

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1 Q. Now, Father -- so let me come back to
2 my question. These states have been complicitous
3 in this, haven't they?

4 A. They certainly have lacked courage.
5 But once again, the key is the new information
6 that's available.

7 Q. I think we just established that they
8 haven't changed their taxation, they still tax
9 it, they still license it and they still permit
10 it to be sold dispute that information.

11 A. Except 40 of them are suing the tobacco
12 industry.

13 Q. They're not going to do anything that
14 might hurt their tax revenues, are they?
15 Instead, they're going to try to put all of the
16 blame for this on the tobacco industries. And
17 aren't you at least somewhat bothered by the
18 hypocrisy of that?

19 A. That had not occurred to me.

20 Q. Well, now that I've raised it with you,
21 aren't you somewhat bothered by the hypocrisy of
22 that?

23 A. I wouldn't call it hypocrisy. I think
24 that is timidity. Why don't they do more to
25 rectify all of their silence and inaction in the

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1 past.

2 Q. Why don't they do it in their own
3 legislatures with their own men and women elected
4 representatives in the legislatures, Father?

5 A. You have to ask them.

6 Q. But you're an expert on the legislative
7 process.

8 A. No, I'm only an expert on legal ethics
9 and on legislation, yes, but I can opine on why
10 Louisiana hasn't acted more favorably.

11 Q. For someone who has been involved in
12 this process for a long time, you understand that
13 the reason they don't do it is because of --
14 through the normal democratic channel of the

15 legislature, they can't do it?
16 A. Except they have raised the taxes in
17 many cases, especially California and
18 Massachusetts, so that's some indication that
19 they know that there is new information.
20 Q. But they still license it, correct?
21 And they still allow the sale and they still
22 collect the taxes, correct?
23 A. As you know, there would be a big, big
24 problem if Connecticut said, we don't allow the
25 cigarette industry to operate here. That would

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1 be probably a violation of the Interstate
2 Commerce clause.
3 Q. Father, the fact of the matter is that
4 if the states wanted to obtain more revenue to
5 cover whatever they believe the burden that is
6 imposed upon them through illness that's claimed
7 to be caused by cigarettes, they have had a way
8 for 40 years, in fact long before then, to do it
9 and that is through their power of taxation,
10 correct?

11 A. Yes.

12 Q. I want to come back, if I can, Father,
13 to some other issues generally relating to lawyer
14 representation. Again, putting aside the tobacco
15 industry specifically and just talking about the
16 normal lawyer role in society, one of the things
17 that lawyers do on a regular basis, and that it's
18 very appropriate for lawyers to do, is to review
19 public statements that are going to be made by
20 the companies they represent, is that correct?

21 A. I echo your caveat that we're not
22 talking about the tobacco industry at all, and I
23 would agree with what you said.

24 Q. You would agree that whether the
25 organization was a corporation or whether it was

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1 Georgetown University or whether it was the
2 Society of Jesus, that when an organization in
3 this day and age is going to make public
4 statement, it is appropriate for them to have
5 lawyers to look at those public statements?

6 A. It depends on what the lawyer is going
7 to do. The lawyer I suppose would be asked, is
8 this legal or not. But if the lawyer is asked to
9 change this, I have some problems with that.

10 Q. If the lawyer is asked for his or her
11 advice on whether it's illegal to make the
12 statement or what the legal implications would
13 be, that would be appropriate?

14 A. Yes.

15 Q. Father, you understand that in the
16 course of your work in this litigation that
17 you've been given documents that were from the
18 files of the tobacco industry, my client, which
19 is Brown & Williamson and others, as to which
20 there is a claim of privilege?

21 A. Yes.

22 Q. And those documents have been provided
23 to us. And you understand that that claim of
24 privilege is at the moment being litigated in the
25 State of Texas?

1 A. I do.

2 Q. That the Judge has not ruled one way or
3 the other as to any of those documents, whether
4 they are or are not privileged, correct?

5 A. I know, yes.

6 Q. Because they have been given to you and
7 you have reviewed those documents, I'm going to
8 ask you some questions about them. I'm not going
9 to mark them as deposition exhibits. We are not
10 waiving our attorney-client privilege by virtue
11 of that but because you've reviewed it, I'm
12 required to ask you some questions about that.
13 Do you understand?

14 A. Yes.

15 MR. KLOK: For the record, the State
16 does not stipulate to that agreement.

17 MR. McCORMICK: Okay. Well, that's
18 fine. I wasn't seeking the agreement of the
19 State.

20 MR. KLOK: Well, it's your decision
21 whether or not you want to show Father Drinan
22 documents you think are at issue with privilege.
23 We view that as a waiver.

24 MR. McCORMICK: Well, you've created
25 the situation where I don't think I have any

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1 choice so I don't think it will be a waiver but
2 we're not going to resolve that today.

3 MR. KLOK: For the record, the State
4 views those documents as issued -- most of them
5 if not all of them as public domain documents.
6 So the defendants proceed at their own peril in
7 showing those documents to Father Drinan.

8 MR. McCORMICK: I understand. And for
9 the record, we don't intend to show Father Drinan
10 any documents that you haven't already shown him.

11 BY MR. McCORMICK:

12 Q. Now, Father, one of the documents that
13 were in the boxes of materials that apparently
14 was provided to you was a letter -- again, I'm
15 not going to mark this as an exhibit but for the
16 record, it is a letter from October 25th, 1984
17 from the Brown & Williamson Tobacco Corporation
18 and specifically from a lawyer by the name of
19 Kendrick Wells to a Mr. H.A. Morini of the
20 British American tobacco company concerning
21 comments that Mr. Wells had made on a draft of a
22 document called the controversy on smoking and
23 health, some facts and anomalies.

24 Do you recall seeing this and reviewing
25 this document?

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1 MR. KLOK: Let the record reflect that
2 counsel has handed over the document to Father
3 Drinan.

4 THE WITNESS: I think I did, sir, yes.

5 BY MR. McCORMICK:

6 Q. And you understand that what the letter
7 is and the booklet that was the attachment to the
8 letter was Mr. Wells' -- and you understand
9 Mr. Wells is a lawyer on the staff of Brown &
10 Williamson Tobacco Company, correct?

11 A. Yes.
12 Q. Who had been asked to review the
13 attached proposed statement that was going to be
14 made by the British American tobacco company,
15 correct?
16 A. Yes.
17 Q. Who is an affiliate of Brown &
18 Williamson?
19 A. Yes.
20 Q. And Mr. Wells sends along to the
21 recipient of that letter his comments both in the
22 letter and then his markings on the underlying
23 document. Do you see that?
24 A. Yes.
25 Q. Now, you don't contend here, Father,

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1 that Mr. Wells committed any ethical violation by
2 responding to a request from his client that he
3 make suggestions or comments or give advice about
4 that document, do you?

5 A. I can't take a position on that. First
6 of all, this is 1984 and I am not able to say
7 right now that these things are a violation of
8 ethics. Did he change it, did he alter the
9 scientific document, I just am not in a position
10 to answer that.

11 Q. Now, in addition to making -- in
12 addition to giving advice about public statements
13 that a company was going to make, whoever that
14 company might be, it would be a normal and
15 expected role of a lawyer to be asked to give
16 similar kind of advice on internal documents that
17 a company was preparing from time to time, would
18 that be true?

19 A. About law related things but not about
20 scientific documents.

21 Q. We'll come back to scientific documents
22 but now what I'm asking is, when a company, and
23 any company prepares many, many documents and it
24 is appropriate sometimes, if I'm a businessperson
25 and I am thinking about circulating the document

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1 within my company, it would certainly be
2 appropriate for me, if I felt a need to do so, to
3 seek the advice of a lawyer as to the legal
4 implications of that document?

5 A. Sometimes, as you say in your question,
6 yes. Sometimes it is.

7 Q. And under what circumstances would it
8 not be permissible for me to seek the advice of a
9 lawyer?

10 A. It would be entirely inappropriate for
11 you to take a scientific document that says
12 such-and-such about our product and give it to
13 the lawyer, especially if you want the lawyer to
14 say, well, we've got to suppress this or this
15 makes concessions that we wouldn't want, and I'm
16 afraid that is what has happened in the tobacco
17 industry.

18 Where the scientific documents were
19 given to lawyers and that the lawyers made the
20 judgment whether this would help us or hurt us
21 and sometimes they perhaps manipulated the truth.

22 And I'm very familiar with this in the case that
23 I mentioned of the scientist at Harvard medical
24 school, Dr. Seltzer, and that the literature is
25 filled with instances where the lawyers have been

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1 abused, if you will. That the lawyers have been
2 asked to do things that are not appropriate for
3 them. So, sir, I would agree in general with
4 your word that sometimes that is appropriate but
5 in some cases, it is not appropriate.

6 Q. I want to come back to Dr. Seltzer in a
7 minute. But again, Father, I'm not asking you to
8 condone any kind of unethical conduct of any kind
9 or illegal conduct. I'm just asking you, in
10 terms of the role, the traditional role of a
11 lawyer, if I have a document as a businessperson,
12 whether it is a document prepared by my
13 accountants, whether it's a document prepared by
14 my engineers, whether it's a document prepared by
15 my scientists, that before I circulate it in the
16 company, I want to get legal advice, honest,
17 ethical, legal advice about its implications, I
18 would be free to do that, wouldn't I?

19 A. Well, it depends upon why you're going
20 to the lawyers. In the instance of the tobacco
21 companies, you come back to that, they went to
22 lawyers for inappropriate reasons and the lawyers
23 in all of these instances did something that
24 lawyers shouldn't do. They have no right to
25 comment on a scientific document. Is this going

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1 to help us or hurt us in the public relations
2 campaign? So I am not able to concur
3 wholeheartedly that in all of these cases,
4 companies send the documents to lawyers.
5 Frankly, I've been in this business for 30 years,
6 I've been a lawyer for 40 or 50 and I've never
7 seen lawyers do what they've done in the tobacco
8 industry.

9 Lawyers don't say to their bosses that
10 we will cover up, we'll give you advice so that
11 you're not going to have any trouble, especially
12 when they don't know anything about the causation
13 of -- about the scientific verbiage in these
14 articles that they review.

15 Furthermore, they were, in many cases,
16 told, You generate the information. They went to
17 scientists and induced them to write things that
18 would be beneficial to the company and to the PR.
19 So that's the inappropriate role. So I'm not
20 going to concede that, generally speaking,
21 attorneys can be used by the companies to review
22 documents.

23 Q. Father, I don't think you heard my
24 question and perhaps it's my fault.

25 A. Repeat it.

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1 Q. I understand that you believe there are
2 circumstances, including circumstances relating
3 to the tobacco industry, when lawyers have
4 inappropriately commented on documents.

5 A. That's right.

6 Q. And by inappropriate, I assume you

7 don't mean inappropriate that you don't like it.
8 You mean inappropriate that it violated the
9 rules.

10 A. Exactly.

11 Q. I want to put that aside because my
12 question, and I would ask you to listen to it
13 carefully in the interest of time here, I am
14 assuming that when I have a document that I want
15 my lawyers to review, that I am expecting and
16 that the lawyer is going to provide 100 percent
17 legal, ethical advice to me. Is there anything
18 wrong with me seeking out the lawyer to do that
19 if I expect him to and if in fact the lawyer does
20 render 100 percent legal and ethical advice under
21 the rules?

22 A. Why wouldn't the lawyer get this
23 automatically in some corporation? The CPA would
24 give him anything that is relevant to the law but
25 you are positing a hypo where the principal

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1 office of the CEO says, well, the lawyer hasn't
2 received this. Why hasn't he received it?

3 Q. Why do you think that was in my
4 hypothetical? I didn't mean it in a million
5 years for that to be in my hypothetical. My
6 hypothetical did not include a CEO, it did not
7 include any speculation that it was odd the
8 lawyer received it. Let me give you my
9 hypothetical again. My hypothetical again was, I
10 am a person in a business and I am looking at a
11 document, whether it was prepared by an
12 accountant, an engineer or anybody else. I want
13 to seek, in the normal course of events, in fact,
14 I almost always seek my lawyer's advice to me, I
15 expect it to be ethical and he gives me ethical
16 advice. Is there anything wrong with that?

17 A. No.

18 Q. Now, who is Dr. Seltzer?

19 A. He was an M.D. or a Ph.D. who worked
20 years ago in Boston and he took money from the
21 tobacco industry and that he was a cardiologist
22 and he allegedly said years ago, in the '60s,
23 that tobacco doesn't cause heart disease. He was
24 challenged, it was a controversy in the Boston
25 community and he subsequently -- at a later time,

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1 he was still working at Harvard even though he
2 was required. Somehow he ended up in the Peabody
3 Museum working and he said something adverse to
4 the Framingham heart study. Framingham was in my
5 congressional district and I know that area quite
6 well and I know something about that study. And
7 at the request of the tobacco industry, he wrote
8 a letter to Robin McNeil saying that Robin
9 McNeil's interpretation was erroneous. And he
10 said something very hostile to the Framingham
11 study group on the heart. That's what I know
12 about Dr. Seltzer.

13 Q. What has that got to do with any of
14 this?

15 A. It's one more example of the tobacco
16 industry that went to this person and this person
17 said what they liked. I'm not challenging

18 Dr. Seltzer. He may have affirmatively come to
19 that conclusion. Maybe he didn't know in the
20 '60s what we all know now. But that is an
21 example that's very vivid to me where he came out
22 and said things that were erroneous and vicious
23 and malicious about the Framingham heart study.

24 Now, I'm not guaranteeing that
25 everything that they said was correct but they
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1 have great esteem in the medical community.

2 Q. You're not in the position as a lawyer,
3 and you've told us before your not a scientist,
4 you're not a doctor, you're not in a position to
5 independently assess the Framingham heart study,
6 are you?

7 A. And I just said that.

8 Q. Dr. Seltzer is a doctor, a medical
9 person?

10 A. Medical or Ph.D. I think he's medical.

11 Q. And he formed an opinion and made
12 statements about the Framingham heart study,
13 correct?

14 A. Uh-huh.

15 Q. You have to answer yes or no.

16 A. Yes.

17 Q. You're not in a position professionally
18 to challenge the opinion that he formed as
19 anything other than his good faith opinion, are
20 you?

21 A. Except that his opinion was so
22 one-sided and so mean-spirited that I wondered
23 what the motivation was. Furthermore, when he,
24 at the behest of the tobacco industry, wrote a
25 letter to Robert McNeil on public television, I

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1 just wonder. I'm not making any final judgment.
2 I'm just saying this is one more bit of evidence
3 to the effect that the tobacco industry is
4 desperate in its public relations to go and get
5 some protection, some evidence to support its
6 long-held erroneous conclusion that tobacco is
7 not wrong.

8 Q. Other than your disagreement with his
9 position and your characterization of it as
10 mean-spirited, you don't have any facts or
11 evidence that says that Dr. Seltzer wasn't
12 speaking his beliefs, do you?

13 A. No, except that he took tobacco money
14 for a long period of time, he was severely
15 criticized for that. And he is not alone. My
16 fault is the lawyers and the lawyers were helping
17 to engineer this whole business of getting
18 scientists to say what we want to hear.

19 Q. What did the lawyers have to do with
20 Dr. Seltzer?

21 A. I'm not certain in that case but
22 lawyers had a lot to do with planning and
23 planting the scientific research.

24 Q. Father, let me come back. Do you have
25 any facts or information -- can you answer this

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1 yes or no -- as to whether the lawyers were
2 involved in any of Dr. Seltzer's statements?

3 A. I'm not certain.
4 Q. You're not certain?
5 A. No.
6 Q. Do you have any information that they
7 were?
8 A. I'm not certain. Sir, I have read so
9 much over the last several weeks -- and this goes
10 back to Dr. Seltzer, for 30 years, that I think
11 this helps to form my deepening conviction that
12 this is a unique situation in American law where
13 certain lawyers have been aiding and abetting the
14 tobacco industry in ways that are inappropriate.
15 Q. Father, believe me, I understand that's
16 your position.
17 A. I'm sorry?
18 Q. I say I understand that's your position
19 here.
20 A. All right.
21 Q. And aside from the fact that the
22 tobacco industry or someone in the tobacco
23 industry at one time funded -- at some period of
24 time funded Dr. Setter's research and aside from
25 fact that you didn't agree with or didn't like

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1 the statements he made, you don't have any
2 information, facts or information, that
3 Dr. Seltzer was acting in any way in bad faith
4 here, do you?
5 A. His conclusions are totally at variance
6 with the scientific community and the position of
7 the AMA.
8 Q. On the Framingham heart study?
9 A. On his general, apparently persisting
10 conviction that smoking does not induce heart
11 disease.
12 Q. Okay. Father, let me come back. You
13 criticized a letter he wrote about the Framingham
14 heart study, correct?
15 A. Yes.
16 Q. Aside from the fact that Dr. Seltzer
17 was supported and funded in part by the tobacco
18 industry in his research and the fact that you
19 didn't like his opinion, you don't have any
20 evidence that when he took that position about
21 the Framingham heart study, that he was acting in
22 anything except good faith, do you?
23 A. He was asked to do it by the Tobacco
24 Institute.
25 Q. Regardless of who he was asked to do it

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1 by, Father, do you have any reason to think,
2 other than this connection with tobacco, that he
3 wasn't speaking from the heart?
4 A. It's very odd that he persisted in this
5 attitude and in bad faith. I'm not saying he's
6 in bad faith. He's in error.
7 Q. Have you ever spoken to Dr. Seltzer?
8 A. No. He was a constituent of mine but
9 we never had much to do with each other. And I
10 didn't get involved in this. And the medical
11 community, many people had lots of problems with
12 Dr. Seltzer.
13 Q. But you yourself have never spoken with

14 him about this?

15 A. Years ago in the '60s, I probably did.
16 I somehow have a recollection that I knew him and
17 that we may have corresponded.

18 Q. My question, though, is as you sit
19 here, Father, do you have any recollection of
20 discussing this subject with Dr. Seltzer?

21 A. No.

22 Q. Father, I want to come back, if I can,
23 to the subject we started on before we got off on
24 to Dr. Seltzer and that is the company's right to
25 seek advice from its lawyers about internal

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1 memoranda and reports that will be circulated
2 within the company. You understand, don't you,
3 Father, from your many years of experience as a
4 lawyer, that a lot of times litigation ensues
5 over the precise meanings of words in a document?

6 A. Yes.

7 Q. And exactly what was meant by words in
8 a document, whether it's a contract or a letter
9 or report can sometimes be the basis for very
10 substantial and very costly litigation?

11 A. Yes.

12 Q. And would you agree, Father, that one
13 of the roles that a lawyer should have who is
14 advising a company is that it is very important
15 in writing internal reports or documents or
16 letters to be careful and precise that you convey
17 correctly what you intend to convey in that
18 letter?

19 A. Yes.

20 Q. And you would not have any problem with
21 a lawyer who gave advice to its clients that all
22 of the people in this company, whether they're
23 accountants, whether they are engineers, whether
24 they're scientists, have to be very careful that
25 they correctly and accurately convey what they

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1 mean to convey in their document?

2 A. Yes.

3 Q. And in fact, Father, as you may know,
4 it's very common for lawyers like me and probably
5 every lawyer in this room to sometimes be asked
6 to come in and give a presentation to our clients
7 where we're asked to show examples of documents
8 where people were careless in what they said and
9 where litigation ensued and to exhort them to be
10 very careful about being precise in what they
11 say?

12 A. Yes.

13 Q. And you wouldn't have any criticism
14 with me or these other lawyers doing that, would
15 you?

16 A. If they abide by all the rules.

17 Q. Of course. If they give good faith
18 advice within all the rules?

19 A. And if the lawyer retains his
20 independence to say the truth, however hostile
21 that might be, however disagreeable it might be
22 to his principals.

23 Q. And one of the documents you received
24 in connection with this case was a letter from

25 David Hardy. Do you know that name?

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1 A. I know it all too well. There is
2 another Hardy too.

3 Q. Well, there is a father and son.

4 A. Yes, I do.

5 Q. It was a letter from David Hardy to a
6 lawyer by the name of Debaun Bryant. Do you
7 recall that generally?

8 A. Generally, yes.

9 Q. Did you find it at all strange that
10 these lawyers would have had, in their
11 possession, a letter from a lawyer retained by a
12 company to the general counsel of that company
13 rendering legal advice?

14 A. I'm called on this. Do you have the
15 document there?

16 Q. Sure. I will show it to you. Again,
17 for the record, this is an August 20th, 1970
18 document from David R. Hardy of the law firm of
19 Shook, Hardy to Debaun Bryant, the general
20 counsel of the Brown & Williamson Tobacco
21 Company. And was this in fact one of the
22 documents that the lawyers here gave to you?

23 A. I remember this letter, yes.

24 Q. Now, Father, did it cross your mind
25 that it was odd to sit here as a witness for and

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1 consultant to a party in litigation against the
2 tobacco companies and be holding in your hands a
3 letter from an outside lawyer to the general
4 counsel of the company rendering legal advice?

5 A. I don't think that's odd, necessarily,
6 but we go to the content of the letter.

7 MR. KLOK: For the record, I want to
8 clarify that. You handed him the letter just
9 now.

10 MR. McCORMICK: I have handed him the
11 letter.

12 THE WITNESS: What's your precise
13 question?

14 BY MR. McCORMICK:

15 Q. My question is, didn't you find it odd
16 that these lawyers had gotten their hands on a
17 letter from an outside lawyer giving advice to
18 the general counsel of his client?

19 A. Somebody obtained it.

20 Q. Did it concern you at all as to how it
21 was obtained?

22 A. Yes.

23 Q. Did you inquire as to how it was
24 obtained?

25 A. It came to my attention how it was

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1 acquired.

2 Q. What came to your attention as to how
3 it was acquired?

4 A. It's been litigated.

5 Q. Pardon?

6 A. This is a part of the litigation, is it
7 not, where the tobacco industry tried to suppress
8 some of these things. And they had three or four
9 cases that I know about and they have not been

10 suppressed.
11 Q. So your view is that there has been a
12 judicial determination that this isn't
13 privileged?
14 A. Not that it hasn't been privileged but,
15 as I recall the law, is that this is now in the
16 public domain.
17 Q. You understand that a client can't
18 involuntarily waive the attorney-client
19 privilege, correct?
20 A. No, but I know the litigation, not
21 fully, and all I know is that this is apparently
22 now usable.
23 Q. Who told you that?
24 A. That was my conclusion. No one told me
25 that.

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1 Q. Father, I want to come back and ask you
2 to focus here on my question. This document is
3 facially privileged, correct?
4 A. Apparently. It says, yes,
5 confidential.
6 Q. And it's written by an outside lawyer
7 and contains legal advice to a client?
8 A. That's right.
9 Q. Now, if my lawyer writes me a letter
10 and somebody breaks into my office, just
11 hypothetically, at night and steals that letter
12 out of my office and publishes it in the New York
13 Times, that letter is no longer confidential,
14 it's now public information, correct?
15 A. Yes.
16 Q. But you haven't waived my privilege by
17 that happening. I still -- because under the
18 law, am I correct, you don't waive your privilege
19 involuntarily. Otherwise, the privilege could be
20 destroyed simply by grabbing these documents and
21 passing them out to a few people?
22 A. Yes.
23 Q. So on what basis, other than the fact
24 that it has been published, and we'll get back in
25 a few minutes to how it was publicized and by

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1 whom, aside from the fact that it was publicized,
2 what is your basis for a belief that it is not a
3 privileged document?
4 A. I'm not certain that I have to get into
5 that. The information here is known by dozens of
6 other sources.
7 Q. Hundreds.
8 A. And the State of Texas doesn't have to
9 use this to prove its case.
10 Q. No, but my question is, Father, the
11 reason I think you do have to get into it is
12 because you, as a licensed lawyer, have
13 obligations under the ethical rules about what
14 happens when a facially privileged document lands
15 in your hands, don't you?
16 A. I think so.
17 Q. And these lawyers have an obligation
18 under the ethical rules as to what happens if a
19 get a facially privileged letter, correct?
20 A. Correct.

21 Q. And what happens is you've got an
22 obligation to notify the other side that you
23 received this document, not to use it for any
24 purpose until a court of law has had the -- been
25 given an opportunity to make a determination as

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1 to the privilege and, in most jurisdictions, to
2 return the document to the party, don't you?

3 A. I'm an outsider on this. I'm not a
4 part of this quarrel.

5 Q. Oh, Father, I'm not so sure you can
6 characterize --

7 A. I can make my case, sir, without using
8 this at all. This is not essential. And if
9 somebody rules this is not essential, I'll just
10 give it back and never refer to it.

11 Q. I'm talking about your obligations as a
12 lawyer, Father, having received this document.

13 A. Well, I have received it from lawyers
14 and if you conclude that this should be returned,
15 I'll be happy to return it.

16 Q. All right. And again, I'm not
17 challenging or suggesting that you've done
18 anything wrong. You were given these by lawyers
19 for the State of Texas.

20 A. That's right.

21 Q. But my question is this. It is the
22 rule and as an expert in legal ethics, you know
23 it is a rule that when a lawyer obtains a
24 facially privileged document, that that lawyer
25 has an obligation to notify the other side not to

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1 publicize the document or use it for any purpose
2 until a court of law has made a determination and
3 in most jurisdictions to return the document,
4 correct?

5 A. Correct.

6 Q. Now, with respect to this letter, and
7 again, under protest because they have given it
8 to you, I'm going to ask you about it --

9 MR. KLOK: And again, I would like to
10 clarify that that record is considered part of
11 the public domain.

12 THE WITNESS: If I may clarify that.
13 Is that true? If that's true, then we can use
14 it. If somehow it became part of the public
15 domain. Mr. McCormick, is that true?

16 BY MR. McCORMICK:

17 Q. Is what true, Father?

18 A. That this is a part of the public
19 domain. That's what counsel just said.

20 Q. I think we've already covered that and
21 I asked you a hypothetical which I think you
22 established, and I believe correctly establish
23 what the state of the law is, that is, if a
24 document is involuntarily stolen from me and
25 given to some other people, that does not destroy

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1 the privilege, does it?

2 A. Well, I defer to Rhett here because he
3 says this is in the public domain.

4 Q. Yes. Well, the facts of whether it is
5 or isn't aren't really important at this moment,

6 I think in light of your previous testimony. So
7 let me just go on from there.

8 A. All right.

9 Q. In this letter, Mr. Hardy, among other
10 things, and if you'll look at the last sentence
11 of the letter, it's actually not the last
12 sentence. The last sentence before the "please
13 advise."

14 A. Yes.

15 Q. It says: Therefore, employees in both
16 companies should be informed of the possible
17 consequences of careless statements on this
18 subject, referring to the subject of causation.

19 Do you see that?

20 A. Yes.

21 Q. You don't have any problem with
22 Mr. Hardy advising his client to inform their
23 employees about the consequences of careless
24 statements on the subject of smoking and health,
25 do you?

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1 A. It depends upon how you define
2 careless. Careless is that they're supposed to
3 follow the party line as cigarettes have not been
4 proved to cause any human disease. And this is
5 1970, after the Surgeon General's report.

6 Q. After the Surgeon General's report of
7 1964?

8 A. That's right.

9 Q. In which he concluded that it had been
10 demonstrated that cigarettes caused disease,
11 correct?

12 A. Yes.

13 Q. My question, though, is, assume,
14 Father -- let me step back. Have you read the
15 deposition in this case of the chairman of
16 British American tobacco industries, Martin
17 Braughton? Does that ring a bell?

18 A. I think it did. What did he say?

19 Q. Are you aware that there is evidence in
20 this case, testimony in this case by the chairman
21 of B.A.T. Industries on the subject of the
22 freedom of the scientists within the
23 organizations which are owned by B.A.T.
24 Industries, the freedom of the scientists to form
25 their own independent scientific conclusions on

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1 these issues?

2 A. I recall that but more relevant is the
3 confession by two of the CEOs that cigarettes can
4 kill people.

5 Q. You're talking now about the Florida
6 depositions of Mr. Bible and Mr. Goldstone?

7 A. Exactly.

8 Q. We'll come back to that. My question
9 was, are you aware of the evidence in this case,
10 sworn testimony in evidence in this case,
11 concerning the freedom of the scientists in the
12 B.A.T. Industries organization to form their own
13 opinions?

14 A. I seem to recall that letter vaguely.
15 That's all I can say.

16 Q. My question is, if that's true, and I'm

17 not asking you to make a final decision as a fact
18 finder whether it's true or not, if the
19 scientists were free to express their view
20 however they came out, as long as they expressed
21 them clearly and concisely, is there anything
22 wrong with the lawyer advising them that they
23 must be very careful, express their honest views
24 carefully and concisely in documents?

25 A. Except that -- who selected the

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1 scientists? Did they select them because they
2 know that they would follow this party line? In
3 this case, once again, this is unique, this is
4 very unusual, where the scientists were picked
5 ahead of time because they are going to conform
6 to our party line.

7 Q. Are you saying that's true of all of
8 the hundreds of thousands --

9 A. I'm not saying it's true of all of them
10 but it is true of some of them.

11 Q. We'll come back to the ones you think
12 it is true of. But if a scientist was picked on
13 the basis of his or her scientific qualifications
14 and credentials and nothing else and was free to
15 express his or her view, is there anything in the
16 world wrong with a lawyer advising that person
17 that they have to be clear and concise and
18 accurate in what they say in their report?

19 A. No, except usually, we don't have
20 lawyers telling them how to write a clear report.
21 We have journalists or we have English experts
22 and the lawyer is telling them to be clear. Why
23 is the lawyer involved? Generally that is not
24 true, that if General Motors or some big company
25 gets scientists to do something, they don't have

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1 to talk to the lawyers, and the lawyers make it
2 clear, in this case the clear innuendo is we want
3 something that will help our industry. The
4 lawyer may not be that frank and blunt but the
5 lawyer is there in order to shake these guys up
6 so they think they are going to turn up something
7 that will be usable by us. That's my feeling
8 when you get the lawyer involved in this totally
9 inappropriate stage.

10 Q. That's your feeling?

11 A. It's my conclusion. Why is a lawyer
12 talking to scientists? He has no knowledge of
13 how or when or why they're going to turn up a
14 certain conclusion. You don't need a lawyer to
15 say, Dr. Scientist, you better be clear.

16 Q. Father, what do you know about what
17 General Motors does?

18 A. I could use Raytheon, I could use ITT.
19 Scratch General Motors. Any company.

20 Q. Let me come back. I understand your
21 views on the tobacco industry. I understand your
22 views on the tobacco industry lawyers but I want
23 to ask you so I clearly can frame the issue here.
24 If I have picked scientists who are -- on the
25 basis of their credentials, if they are free to

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1 come to the conclusions that they believe are

2 scientifically correct and because we both know
3 and both agreed that sometimes how you write, if
4 you write carelessly, can have implications,
5 including litigation implications.

6 And we have agreed that lawyers like me
7 frequently get called in to give this exact
8 speech to business people, is there anything
9 wrong with a lawyer, putting aside Mr. Hardy for
10 a minute, with a lawyer being asked to give
11 advice to business people from all disciplines
12 about being very careful about what they wrote?

13 A. When you say very careful, I assume
14 that the lawyer would say that it is opposition
15 that cigarettes have not been proved to cause any
16 human disease and that we hope you stay within
17 that parameter. What else is the lawyer going to
18 say? Here is our conclusion. You were hired by
19 the company to do this science but we hope you
20 come out this way. Why else is the lawyer there?

21 Q. Father, we'll come back to Mr. Hardy.
22 I want to ask you now, as a general proposition,
23 is there anything wrong with that advice? Why is
24 that so difficult? I am telling you, we will
25 come back to this. I want to put this document

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1 aside.

2 A. What is your precise question, then?

3 Q. My precise question is, it's entirely
4 appropriate for a lawyer to advise his client
5 that regardless of their discipline, whether it
6 be accounting or science, that they should be
7 very careful and avoid careless statements in the
8 reports they write?

9 A. Scientists who are imminently qualified
10 don't need to have a lecture from a lawyer that
11 you should be clear.

12 Q. That's your view.

13 A. That's common sense.

14 Q. Okay, Father. My question, though, is
15 if business people in a community, a business
16 community, that work in a corporate environment
17 and see a lot of work being done and a lot of
18 statements being made that sometimes are
19 careless, seek to have the advice of their
20 lawyers, as I told you that some people seek my
21 advice to come in and exhort them to be careful,
22 there is nothing per se wrong with that, is
23 there?

24 A. Except it depends upon the motive. You
25 could let the scientists do their own work and

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1 then the lawyer would come along and say, this is
2 clear or is this consistent. But to have the
3 lawyer come to a group of ten scientists in this
4 room and say, we want your conclusions to be
5 clear and careful. What do you mean careful?
6 They're Ph.D.s. They're going to be careful.
7 They've done research before.

8 Q. You say, then you let the scientists do
9 the research and write the report and let the
10 lawyers look at it and if they have questions,
11 then they ought to raise the question then, is
12 that your position?

13 A. I don't understand why the lawyer is
14 there at all. If they are saying something
15 entirely outside their realm, they as a lawyer,
16 myself as a lawyer, does not know anything about
17 all of the important and technical things that
18 they are writing about.

19 Q. Do you know what David Hardy knows
20 about science, Father?

21 A. No. All I'm saying is that these
22 scientists, when you have hired them, you say, if
23 we want to prove whether or not cigarettes cause
24 cancer, you go and do your work. But if a lawyer
25 lectures them ahead of time, we want your

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1 conclusions to be careful, what do you mean
2 careful? We want them to be accurate, we want
3 you to ground your study in medicine and biology
4 and all the new science. But when the lawyer
5 lectures them ahead of them, we want you to be
6 careful, what do you mean? Careful?

7 Q. It's all right for them to say that
8 they want them to be accurate but they can't tell
9 them they want them to be careful?

10 A. He has no right to say accurate.
11 That's an arrogant insult to the ten physicians
12 in this room, we want you to be accurate. They
13 are hired because they have been accurate. And
14 when you say, we want you to be careful, what do
15 you mean careful?

16 Q. So your position is that the lawyers
17 should have no business advising on the wording
18 of internal documents, that's basically your
19 position?

20 A. You've spread that. These are not
21 internal documents. These are the documents of
22 ten scientists as to the toxicity of tobacco.
23 And the lawyer doesn't know anything about that.
24 If he wants to look at them afterwards, that's
25 perfectly his privilege, but how is he going to

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1 correct them? He doesn't like the conclusion?

2 Q. Let me come back to my question and ask
3 you to answer it. Is it your position that
4 lawyers then, as a practical matter and an
5 ethical matter, have no business advising
6 scientists on the wording of documents?

7 A. That would be my intuition, yes. I'm
8 not going to say this is an absolute conclusion.

9 Q. Well, Father, you're here to give
10 conclusions as an expert.

11 A. I would say it's inappropriate.

12 Q. And what rule does it violate?

13 A. He has to be content. That's number
14 1.1. And that a lawyer shall provide competent
15 representation to a client. Competent
16 representation requires the legal knowledge,
17 skill, thoroughness and preparation reasonably
18 necessary for the representation. And he doesn't
19 know anything about this scientific content.

20 Q. I'm going to come back to that for a
21 minute, Father. But he's not giving any advice
22 on the scientific content.

23 A. He's telling them to be careful.

24 Q. If a lawyer advises his client that
25 there are implications if you make careless
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1 statements and that you should be very careful to
2 accurately represent your position in the
3 documents, that doesn't require him to have any
4 scientific knowledge, does it?
5 A. No, but he's telling them what you
6 learn in English 101, write clear sentences.
7 Q. And while that may be -- you may wonder
8 why that happens, on its face, there is nothing
9 wrong with that, is there, Father?
10 A. It's a misuse of a lawyer's time.
11 Q. Is there anything else wrong with it?
12 A. Yes, there is. You're intimidating the
13 physicians. You are telling them that there is
14 some criteria here above and beyond that of
15 absolute honest scientific evaluation. We want
16 you to be careful.
17 Q. Father, let me come back to what
18 lawyers know. You don't know what David Hardy
19 knows about science, do you?
20 A. I don't know.
21 Q. You don't know what David Hardy's
22 education has been in science, do you?
23 A. No.
24 Q. You don't know what David Hardy's
25 experience over the years as a lawyer working

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1 with scientists has created in terms of his
2 knowledge about scientific issues, do you?
3 A. No.
4 Q. And what would you understand and I
5 hope would agree with is that the lawyers who
6 work -- particularly lawyers who work for a long
7 period of time on the staff of a company or work
8 for a company for a long time often learn many
9 business things about their client, don't they?
10 A. Yes.
11 Q. And they have legal knowledge but they
12 may, after having worked with people in that
13 company, whether it be with the accountants,
14 whether it be with the scientists or whether it
15 be with anyone else, the marketing people, they
16 have learned they can learn a lot, maybe not
17 enough to make them an expert but they learn a
18 lot about the business of a company if they're
19 doing their job, don't they?
20 A. Yes.
21 Q. And there is nothing wrong, I assume,
22 if I'm the CEO of a company and I want my general
23 counsel to give me advice, including advice on
24 things that I know he is very experienced in that
25 are nonlegal, I can seek his advice as a lawyer

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1 and I can also seek his advice, if he's competent
2 to give it to me, on nonlegal matters, correct?
3 A. Yes.
4 Q. Whether those be marketing or whatever
5 his skill might be, correct?
6 A. Yes.
7 MR. CLARKSON: Counsel, we've taken
8 more than an hour and 15 minutes. Could we have

9 another break?

10 MR. McCORMICK: Of course. Let me just
11 finish up one question.

12 MR. CLARKSON: All right.

13 BY MR. McCORMICK:

14 Q. And as a lawyer, if I have, by virtue
15 of my years of experience in working with a
16 company, if I have learned something, not on a
17 legal issue but on one of these other subjects,
18 because of various assignments that I have, it's
19 perfectly appropriate, within the lawyer's rules,
20 for me to consult with or give advice on those
21 nonlegal matters to my client even though I'm a
22 lawyer?

23 A. Yes.

24 MR. McCORMICK: Why don't we take a
25 break.

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1 (Recess.)

2 BY MR. McCORMICK:

3 Q. Father, I want to come back to the
4 subject of research programs into a company's
5 product. You are aware, I assume, that when a
6 company undertakes a research program, whether a
7 company undertakes a research program and what
8 that research program is into the characteristics
9 of its product, that those decisions have legal
10 implications?

11 A. Yes.

12 Q. And in fact, there are certain
13 obligations under the law that a company has to
14 be aware of the properties of the products it
15 sold, correct?

16 A. I agree fully.

17 Q. And whether a company undertakes or
18 doesn't undertake or the amount of research it
19 does or it doesn't do, as a result of that
20 obligation, has legal implications, correct?

21 A. Yes.

22 Q. And it is appropriate for a company to
23 consult with its lawyers in formulating what its
24 research programs are going to be?

25 A. Yes.

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1 Q. Let me give you another situation here,
2 Father. I want you to assume that a company
3 was -- let me start that question over. And let
4 me come back to your disclosure for a minute to
5 try to address this. In your disclosure, and if
6 you have it there in front of you, which has been
7 marked, I believe, as Exhibit 1, on this general
8 subject of the attorney-client relationship and
9 legitimate lawyer activity, the disclosure goes
10 on to say that Father Drinan will illustrate what
11 action or set of actions go beyond the attorney's
12 role, correct?

13 A. Yes.

14 Q. How are you going to illustrate that in
15 your testimony here?

16 A. That in the long history of the tobacco
17 industry, they have employed lawyers to do
18 something that lawyers aren't good at, namely,
19 seeking out scientists that will document the

20 basic proposition of the tobacco industry that
21 cigarettes have not been proved to cause any
22 human disease. Obviously the lawyers, as the
23 agents, are seeking out scientists who will give
24 them scientific evidence that will demonstrate
25 the basic assumption of the tobacco industry.

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1 Now, this is 1970. Maybe after the two
2 CEOs have confessed that they were wrong and
3 these things do kill people, maybe the lawyers
4 wouldn't be seeking this, but that that is the
5 fundamental proposition, that lawyers are in the
6 situation, seeking to get scientists that will
7 document the basic assumption and falsity of the
8 tobacco industry.

9 Q. Aside from your belief that the tobacco
10 industry lawyers have sought out scientists who
11 will reach certain results or conclusions, how
12 else do you plan to illustrate actions or sets of
13 actions going beyond proper attorney role?

14 A. There are many instances where the
15 scientific document comes to the lawyer or comes
16 to the company, it's not exactly what the tobacco
17 industry wanted, and they give it to the lawyer
18 and he bind it up in the attorney-client
19 privilege and makes it unavailable.

20 There are other instances where they
21 took documents and sent them offshore. It might
22 have been in contemplation of a lawsuit, they
23 don't know. But that they didn't keep a record
24 of the documents that were sent to London or
25 someplace else. That's not good lawyering.

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1 Q. Anything else that illustrates or
2 demonstrates, to your view, actions or sets of
3 actions beyond the proper attorney role?

4 A. I think that lawyers in the legislative
5 area try to misinform and mislead people in the
6 Congress as well as public opinion. Lawyers
7 aren't supposed to be doing that. Lawyers
8 obviously can lobby legitimately for something
9 that they believe in but that they concealed
10 information and they aided and abetted in that.

11 For example, I think the record will
12 show that lawyers and others were successful in
13 keeping the word addiction out of the Surgeon
14 General's warning.

15 Q. Anything else?

16 A. Well, I think the lawyers probably
17 persuaded the seven CEOs in the hearings in 1994
18 to say, seriatim, we do not think that tobacco is
19 addicting.

20 Q. You think they do but you don't know
21 whether they did or not?

22 A. We don't know.

23 Q. I want to come back -- as the things
24 reflected in your disclosure, the things that are
25 lawyers did in the tobacco industry, in your

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1 opinion, that go beyond the proper role. And
2 you've mentioned seeking out scientists who will
3 come to a conclusion, abuse of the
4 attorney-client privilege, shipping documents

5 offshore and misrepresentations in connection
6 with legislative issues.

7 A. And I reserve my rights to name more.

8 Q. Of course. But is there anything else
9 you can think of right now?

10 A. Not now.

11 Q. What lawyer, in the history of the
12 tobacco industry, do you know of who has been
13 charged with -- who has been engage in seeking
14 out scientists for the company? You're not
15 talking about seeking out consultants in
16 litigation, are you?

17 A. No.

18 Q. You're talking about seeking out
19 scientists for the company. When has that ever
20 happened that you know of?

21 A. I think it's clear, from all the
22 documentation that we have, that lawyers formed a
23 little group and their mandate was to go and find
24 scientists who will document our side of the
25 case. They went out and sought these scientists.

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1 And it was the lawyers in some of these cases
2 that were approving whether we will hire Dr. X or
3 Dr. Y. They agree with our position, therefore,
4 let's give them some money so that this research
5 will be done. That's fully documented.

6 Q. Father, I understand you think it's
7 fully documented but what I'm trying to do right
8 now is find out -- and I realize you can't
9 memorize every one of thousands of documents but
10 what I believe I'm entitled to -- in light of the
11 work that you've done and in light of the
12 eminence of the trial in this case, I'm entitled
13 I believe now to know what, as you sit here,
14 specific incidence of that you can remember.

15 A. I may or may not have some specific
16 documents here. I have relied upon the work of
17 the Advocacy Institute. This is a very
18 impressive document and that -- they don't come
19 down on lawyers as such here, but interwoven with
20 this material is the fact that the lawyers have
21 been very active in this area and that they went
22 and sought out the scientists or they induced the
23 scientists to say things that were beneficial to
24 the interests of the tobacco industry.

25 Q. Father, you're referring to a document

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1 entitled Comprehensive Framework and Analysis of
2 Tobacco Industry, Strategies and Tactics?

3 A. That's right.

4 Q. By the Advocacy Institute?

5 A. Right.

6 Q. The Advocacy Institute doesn't -- am I
7 correct, does not say in that document that there
8 was any lawyer misconduct involved in this, does
9 it?

10 A. They give the background information.
11 They are nonjudgmental.

12 Q. Maybe they're nonjudgmental and maybe
13 they're, as their name suggests, highly
14 judgmental. But Father, my question is, you read
15 this article that was written by some

16 organization called the Advocacy Institute?
17 A. That's right.
18 Q. And you're relying on that article for
19 your testimony here?
20 A. No, that's only one of the many, many
21 things I'm relying upon.
22 Q. Father, let me -- just answer my
23 question, if you will, and I'm going to ask the
24 next question next. Are you relying on the
25 Advocacy Institute article you just pulled out,

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1 in your testimony in this case?
2 A. It's helpful, and that -- I'm not
3 saying I'm relying upon it. It's informative.
4 Q. Why are you not willing to say you are
5 relying on it?
6 A. Because things there are beyond my
7 competence. They go into the whole history of
8 this dispute and I'm not able to say whether they
9 are entirely correct in their conclusions or not.
10 Q. I didn't ask you if you were accepting
11 everything they said. My question is, are you
12 relying in any way on the article written by the
13 Advocacy Institute that you just identified?
14 A. It has entered my mind. I don't know
15 whether I'm relying upon it but that it was very
16 informative. What do you mean relying upon?
17 Q. I mean does it inform your opinion in
18 this case.
19 A. It has informed my opinion. I'm not
20 certain that it's entirely correct or not.
21 Q. Let's come back to the subject we were
22 on. With respect to the subject of lawyers
23 trying to hire tobacco industry scientists who
24 will reach a certain conclusion, do you have any
25 information on that other than the information

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1 contained in the article by the Advocacy
2 Institute?
3 A. Yes, I do. And I'm wondering whether I
4 could have a -- could bring that back this
5 afternoon or Tuesday when I get my material
6 together.
7 Q. All right.
8 A. All right.
9 Q. I'll be happy to do that but I want to
10 ask you right now, then, is the reason you're
11 asking for that is so you could refresh your
12 recollection on the materials, correct?
13 A. I have an article here from the Journal
14 of the American Medical Association on which I do
15 rely. Lawyer Control of Internal Scientific
16 Research to Protect Against Product Liability
17 Lawsuits. This is 1995.

18 Q. Could I see that article?
19 A. (Witness proffers document.)
20 (Drinan Exhibit No. 3 was
21 marked for identification.)

22 BY MR. McCORMICK:
23 Q. Father, I have now marked as Drinan
24 Exhibit 3 the article from the Journal of the
25 American Medical Association that you just

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1 referred to, is that correct?

2 A. Yes. And there is a second article
3 from the Journal of the American Medical
4 Association, July 19th, 1995, Lawyer Control of
5 the Tobacco Industry's External Research Program.

6 MR. McCORMICK: Could we mark that as
7 Exhibit 4, please.

8 (Drinan Exhibit No. 4 was
9 marked for identification.)

10 BY MR. McCORMICK:

11 Q. Father, let me ask you, with respect to
12 Exhibit 3, this is a second article out of the
13 same issue, right?

14 A. And there was a third and fourth, I
15 think, which I don't seem to have here.

16 Q. But which you've relied on all of them?

17 A. Yes.

18 Q. All right.

19 A. And I've also relied upon the Waxman
20 report. I don't have that here.

21 Q. Specifically on your allegation or your
22 charge that lawyers have hired tobacco company
23 scientist to reach a certain conclusion?

24 A. Uh-huh.

25 Q. Your answer is yes?

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1 A. I'm sorry, say that again?

2 Q. I say, you say you're relying on the
3 Waxman report. Are you relying on that report in
4 support of your claim that lawyers have hired
5 scientists to work at the tobacco companies in
6 order to reach a certain conclusion?

7 A. Well, I don't have that report here.
8 That report says so many things. My recollection
9 is that it does, yes, indicate that lawyers have
10 been involved in this area.

11 Q. Now, you've mentioned the Advocacy
12 Institute, you've mentioned the JAM articles,
13 which two of which have been marked as exhibits,
14 the rest haven't, the others in that issue have
15 not.

16 A. Yes.

17 Q. All the JAM articles that you're
18 referring to were articles contained in a single
19 issue?

20 A. Correct.

21 Q. So we have the Advocacy Institute,
22 you've mentioned the JAM articles, the Waxman
23 report. Is there any other source of information
24 that has caused you to believe that lawyers have
25 hired scientists to work at tobacco companies to

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1 reach a certain -- Father, every time you do
2 that, I have to start the question over.

3 A. I'm sorry.

4 Q. And it just slows us down. You've
5 mentioned the JAM articles from the single issue
6 of JAM which had multiple articles, two of which
7 have been marked here and others which have not,
8 the Waxman report and the Advocacy Institute
9 report. Have you relied on any other document in
10 making your charge that lawyers for the tobacco
11 companies have hired scientists to work at these

12 tobacco companies to reach a certain conclusion?
13 A. May I reserve my rights to offer
14 further scientific information this afternoon or
15 Tuesday? I think that there are others. I can't
16 remember them right now.

17 (Witness confers with counsel.)

18 THE WITNESS: If that's agreeable.

19 BY MR. McCORMICK:

20 Q. Father, what I'm real interested in is
21 knowing what you know right now and if you learn
22 something later, whether it be now or later, then
23 we'll deal with that.

24 A. Let me speak to that right now. The
25 JAMA article in 1995 says the tobacco industry

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1 consistently maintains that it funds independent
2 scientific research to resolve the smoking and
3 health controversy. The Brown & Williamson
4 Tobacco Corporation documents, however, describe
5 the role of lawyers in the selection of research
6 projects for funding. The documents also
7 describe how these lawyers used externally funded
8 scientific research in an effort to refute the
9 scientific evidence about tobacco, to perpetuate
10 controversy about the health effects of tobacco,
11 and to provide defensive research that could be
12 used to respond to adverse publicity, all without
13 involving tobacco industry scientists directly.

14 Q. Father, I have more than passing
15 familiarity with that article, and that's not
16 what I asked you about. Can you answer my
17 question? Aside from the JAMA articles, the
18 Waxman report, the Advocacy Institute report, is
19 there anything else that you rely on on this
20 claim that tobacco industry lawyers hired
21 scientists to reach a certain conclusion?

22 A. I thought I made it clear just a moment
23 ago that I would be grateful if I could bring
24 that information this afternoon or Tuesday. That
25 information is not in my mind right now. Is it

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1 agreed that I will be able to bring this back?

2 Q. Well, it's certainly agreed that your
3 counsel will have an opportunity to ask you any
4 questions that he wishes in this case but right
5 now, I'm entitled to know what you have in your
6 mind at the moment and are we in agreement that's
7 all you have in your mind at the moment?

8 A. No, it's not. But I can't immediately
9 recall the other information that I have.

10 Q. Let me come back to these instances
11 that are reported in these sources that you've
12 identified. Again, we can all look at them and
13 see what they say or what they don't say but are
14 there any that were significant enough, any
15 instances of this that were specific enough that
16 they stick out in your mind and that you can
17 actually remember them at this point?

18 A. Yes, there are several cases here where
19 the lawyers, in my view, did something very, very
20 inappropriate. They involve themselves in
21 selecting the scientists and then seeking to
22 alter or modify or accommodate their conclusions

23 in ways that would be beneficial to the tobacco
24 industries. The documents demonstrate that the
25 tobacco industry in general, and B&W in

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1 particular, were very concerned about the threat
2 of products liability lawsuits and they
3 illustrate some of the steps taken by lawyers at
4 that company to avoid the discovery of documents
5 that might be useful to a plaintiff in such a
6 lawsuit. We also have the deadwood documents and
7 I refer to those.

8 Q. Father, the deadwood documents don't
9 have anything to do with the selection of
10 scientists?

11 A. No, that's another issue.

12 Q. Can't you focus on my question? Do you
13 have any specific instance in mind in which a
14 lawyer has done what you're charging these
15 lawyers to do?

16 A. In many cases, the law firm special
17 projects, lawyers and the tobacco industry
18 executives were intimately involved in funding
19 decisions for university projects. For example,
20 a site visit to Washington University in 1980 to
21 review the university's request for continued
22 support was organized by Shook, Hardy & Bacon.
23 The site visit committee consisted of the
24 executive offices of B&W, Liggett & Myers, Philip
25 Morris, R.J. Reynolds, Tobacco Associates, the

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1 Tobacco Institute and U.S. Tobacco. This
2 situation contrasts with the scientific peer
3 review process where the typical site team
4 consists largely of scientists.

5 Q. Father, you're reading from the JAMA
6 article?

7 A. I am.

8 Q. And I won't come back to the Washington
9 University incidence. JAMA has stated this is a
10 general proposition, correct?

11 A. What is the this?

12 Q. That's a fair question. First of all,
13 you understand that the editorial board -- well,
14 let me start that question over. What is the
15 site visit that they're referring to to
16 Washington University, do you know, Father? I
17 know you know the words that they say there but
18 do you know anything about what they're referring
19 to other than what the JAMA editorial board has
20 put in these --

21 A. I've seen references elsewhere to this
22 that Washington University picked up 8.1 million
23 in a period of some 20 years and other
24 universities are involved, UCLA picked up 2.7.
25 So I know generally that this was done by

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1 lawyers.

2 Q. Father, I want to get beyond the
3 general down to the specifics. Of course these
4 universities have gotten millions of dollars.
5 You understand that the council for tobacco
6 research alone has given grants, if I'm not
7 mistaken, something like \$600 million in support

8 of science, do you understand that?

9 A. That's not exactly the support for
10 science but go on.

11 Q. We'll come back to that point but the
12 fact of the matter is -- my question was, what
13 does that site -- first of all, what do you know
14 about that site visit to Washington University?

15 A. I know that they made the frank
16 statement way back and that they said, we want to
17 open up this so that we will know what is good
18 for the health of Americans. This is our prime
19 point of reference. And in my judgment, they
20 have not lived up to that.

21 Q. Father, you don't know anything about
22 this site visit to Washington University.

23 A. That's irrelevant, sir. I site this.
24 You haven't attacked the source of this. I don't
25 have to know what happened at the Washington

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1 University. All these lawyers showed up to do a
2 survey on something scientific. That's most,
3 most unusual.

4 Q. Father, let me come back to my
5 question. You don't know anything about this
6 site visit to Washington University other than
7 what the JAMA editors or writers put in that
8 article, do you?

9 A. I'm not certain but that in and of
10 itself is enough to convince me of my point.

11 Q. You're not certain whether you know or
12 not?

13 A. What's the relevance of your question?

14 Q. Well, Father, don't worry about the
15 relevance of my question.

16 A. I have to before I answer.

17 Q. I'm trying to test what your knowledge
18 here is as supposedly an expert on this subject.
19 And I believe, I don't understand why this is so
20 difficult to get an answer to, that you don't
21 know anything about that Washington University
22 site visit other than what's in that article.

23 A. I know that that is not a loan and that
24 there are many, many other cases here. And, sir,
25 again, what is the relevance of my knowing more

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1 about Washington University? I've said enough to
2 prove my point.

3 MR. KLUGMAN: I object and move to
4 strike the answer as nonresponsive.

5 BY MR. McCORMICK:

6 Q. Let me come back to my question,
7 Father. Can you answer it yes or no, do you have
8 any information beyond what's in that JAMA
9 article about the Washington University site
10 visit?

11 A. Once again, I'm just getting direct
12 here, that if I say no, what does that prove,
13 that I'm incompetent to judge this?

14 Q. It doesn't necessarily prove that,
15 Father, but I think I'm entitled to an answer to
16 my question because I'm entitled to know what
17 facts you are relying on. You must understand
18 that. You understand that, don't you? I'm

19 entitled to defend my client to know that.
20 A. Yeah, but you're going to say that
21 Drinan said no and, consequently, this shows how
22 shallow his knowledge is about this whole area.
23 Q. Let's not worry about what I'm going to
24 say, Father.
25 A. I have to worry about what you're going

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1 to say down the line.
2 Q. Let's worry about the truth.
3 A. The truth is I know about it and other
4 things around it and if you get a no from me,
5 you're going to misuse it to say that Drinan
6 doesn't know what he's talking about.
7 Q. Can you identify any other facts for
8 us?
9 A. I'm not going to say no, sir, because
10 it's irrelevant and immaterial. I know this
11 topic and you want to pin me down on this one
12 thing? What does that mean? And then you're
13 trying to impeach my credibility later on.
14 Q. Whatever, Father. I believe I'm
15 entitled to an answer to my question. If you
16 refuse to answer it, you refuse to answer it. I
17 can't force you to do that here today. But my
18 question is, do you have any facts, specific
19 facts about the Washington University site visit
20 that aren't in JAMA?
21 A. I decline to answer.
22 Q. You refuse to answer my question?
23 A. Yeah. I don't think it's relevant and
24 I just don't say yes or no.
25 Q. And even someone who hasn't practiced

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1 in the traditional way, you must understand that
2 relevance is not an objection to a question in a
3 deposition, don't you, Father?
4 A. Yes.
5 Q. So there is no legal basis for your
6 refusing to answer that question and I want you
7 to answer it. Do you have any facts or
8 information about the Washington University site
9 visit not in JAMA?
10 A. Could I ask once again that this
11 afternoon or Tuesday, I'll get whatever
12 information I have?
13 Q. You can ask that but I'm entitled to
14 know as you sit here now whether you have any
15 more or not.
16 A. At this moment, no.
17 Q. That wasn't so hard, was it?
18 A. Yes, it was.
19 Q. Actually, it was.
20 MR. KLUGMAN: Yeah, I was about to say.
21 BY MR. McCORMICK:
22 Q. Father, in your disclosure statement,
23 you state, on page 1, in the immediate sentence
24 following the one I just read, that: Father
25 Drinan will explain the crime, fraud and tort

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1 exception. Do you see that?
2 A. Yes.
3 Q. Now, Father, as someone who has been

involved in these issues of privilege for some time and in many different contexts, I am surprised and I assume you were surprised as well to see this doctrine characterized as the crime/fraud tort exception. That's not how it's usually characterized, is it?

A. You're right.

Q. It is more appropriately called the crime/fraud exception?

A. That's right.

Q. And are you familiar with the Fifth Circuit controlling authority on the crime/fraud exception?

A. I think you mentioned that before.

Q. No, I asked you a different question.

A. I'm not certain. What is the case?

Q. The case is Ward against the Succession of Freeman.

A. I'm not familiar with it, no.

Q. Let me ask you this. Are you familiar generally that the controlling law on this is that in order for someone to invoke the exception

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to the attorney client privilege known as the crime/fraud exception, they have to establish that the client was planning or engaging in a crime or fraud, correct?

A. Yes.

Q. And that the attorney was rendering advice in furtherance of that activity?

A. Yes.

Q. That's the standard, correct?

A. Yes.

Q. You were, if I recollect correctly, a consultant to something called the committee on the restatement of the law governing lawyers, correct?

A. That's right.

Q. And are you still?

A. Yes.

Q. During what period of time have you been a consultant?

A. Probably three years, almost since the beginning.

Q. And during that time, that committee, the committee on the restatement of law governing lawyers, has issued three major restatements, correct?

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A. That's right.

Q. And you've been involved in those?

A. Yes.

Q. And a lot of effort has gone into those three statements, correct?

A. Yes.

Q. By you and many others?

A. That's right.

Q. And the best effort has been made by that committee and its members, including you, to try to resolve and articulate the rights and the duties of a lawyer who finds a client engaged in fraud or wrongdoing?

A. Yes.

15 Q. And despite all of that effort and
16 study by you and the other members of the
17 committee, those three restatements have in fact
18 not resolved the rights and duties of an attorney
19 who finds his client engaged in fraud or
20 wrongdoing, have they?

21 A. I'm not certain what you mean by
22 resolved.

23 Q. Isn't it true that it's still unclear,
24 despite all that effort, exactly what the rights
25 and duties are of a lawyer in that situation?

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1 A. The ALI has not finalized that entire
2 document and I don't know right now whether that
3 section is still under advisement by the entire
4 council.

5 Q. You don't know one way or the other?

6 A. No.

7 (Drinan Exhibit No. 5 was
8 marked for identification.)

9 BY MR. McCORMICK:

10 Q. Father, showing you what has been
11 marked for identification as Drinan Exhibit 5 --

12 A. You did well in your research.

13 Q. This is a law review article written by
14 you, correct?

15 A. Correct.

16 Q. And published in the Journal of College
17 and University Law?

18 A. Yes.

19 Q. If you look at page 313 of that
20 article, where it says Conclusions.

21 A. Yes.

22 Q. Did you write in the conclusion to this
23 law review article the following: Must we then
24 conclude that the ABA's three major restatements
25 of legal ethics have not resolved the rights and

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1 duties of an attorney who finds his client
2 engaged in fraud or wrongdoing, question mark.
3 The answer is yes. End of quote. Did you write
4 that in this law review article in 1993?

5 A. I did.

6 Q. And was that a correct statement then
7 and is it a correct statement now?

8 A. If you read it in context with
9 everything before and afterwards.

10 Q. Now, Father, are you familiar with the
11 procedures that are followed in connection with
12 the --

13 A. Do I need that back?

14 Q. We're going to get back to that article
15 on another point but not on this point. Are you
16 familiar with the procedures that are required to
17 be followed by courts in the event that a claim
18 of privilege is challenged on the basis of the
19 crime/fraud doctrine?

20 A. Yes.

21 Q. Are you familiar with the Supreme
22 Court's case, the Zolin case by the Supreme
23 Court?

24 A. Of course.

25 Q. And then you understand that if a

1 client claims privilege, that is, claims that a
2 communication that it has had with its lawyer is
3 privileges, that the first step, if you will, in
4 the Zolin procedure is that the court is to
5 determine whether or not the claim of privilege
6 is appropriate on a prima facie basis, relying
7 only on nonprivileged evidence lawfully obtained,
8 correct?

9 A. Correct.

10 Q. Now, the disclosure, Father, states
11 that you're going to describe how the actions of
12 the tobacco industry lawyers meet this exception,
13 correct?

14 A. Where is that precisely here?

15 Q. If you look at your disclosure on page
16 1, in the what is in effect the third paragraph,
17 it says, third line down: Father Drinan will
18 explain the crime/fraud and tort exception and
19 how the actions of the tobacco industry meet this
20 exception.

21 A. Yes.

22 Q. And a better way to put that sentence
23 would have been the crime/fraud exception,
24 correct?

25 A. Well, you can quarrel about that.

1 Q. But in any event, you were going to
2 testify how the action of the tobacco industry
3 meet this exception?

4 A. That's right.

5 Q. Can you tell me what actions of the
6 tobacco industry lawyers or the tobacco industry
7 you believe satisfied the crime/fraud exception?
8 I understand you believe that to be true
9 generally. I'm asking you for any specific
10 instance in which a specific attorney-client
11 communication you believe should be revealed
12 because of crime/fraud.

13 A. I think that it is clear that the
14 crime/fraud exception would apply to certain
15 documents that were wrapped up in the privilege
16 of the lawyers but that they were not entitled to
17 that because it is not really a confidential
18 agreement. This is a scientific report adverse
19 to the tobacco industry and they stamped it
20 confidential lawyer-client privileged or work
21 product. That is not entitled to the privilege.

22 Q. But Father, that's a different subject,
23 isn't it, and we're going to come back to that
24 later. I'm not asking you about times when the
25 privilege was asserted when in fact it wasn't a

1 work product or it wasn't a real attorney-client
2 communication. I'm not asking you about that.
3 And trust me, we're not going to tend this
4 deposition before I do.

5 Right now, I'm asking you about your
6 statement about the crime/fraud exception, that
7 is, where there has been a privilege asserted and
8 it was an appropriate privilege except it's
9 deprivileged or the privilege is lost because of
10 the crime/fraud exception.

11 A. I don't know whether that has actually
12 happened yet. I would assume it has happened in
13 some of the cases that I have but that this has
14 not been adjudicated in every single state yet or
15 in this litigation.

16 Q. Or in any state that you know of?

17 A. I don't know. In the 46, only three
18 have gone to trial, is it? Would you rephrase
19 your question, please?

20 Q. Of course I will. My question is, do
21 you know of any -- as you sit here today,
22 prepared to give an expert opinion in this case,
23 do you know of any specific attorney-client
24 communication that you've concluded should lose
25 the attorney-client privilege because of the

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1 crime/fraud exception?

2 A. Well, it's not up to me to adjudicate.
3 It's what the states have said, Florida in the
4 Burton case and the New Jersey case. So that I
5 would say that that has happened. If it hasn't
6 happen, it should happen where some of these
7 communications where the tobacco industry
8 unethically, or their lawyers, they thought to
9 conceal information that is not entitled to the
10 confidentiality.

11 Q. Yes, Father, but again, specifically,
12 you hold yourself out in this disclosure as an
13 expert on the application of the crime/fraud
14 doctrine, correct?

15 A. Yes.

16 Q. The crime/fraud doctrine requires that
17 the person asserting it show, as we established
18 before, that the client was planning or engaged
19 in a crime or fraud and that the attorney was
20 rendering advice in furtherance of that crime or
21 fraud, correct?

22 A. I would assume that the attorney
23 general of Texas has done that or will do it.

24 Q. My question, though, is, Father, are
25 you prepared to give an opinion that any of these

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1 specific communications that have been supplied
2 to you or that you've heard about should be
3 deprived of their attorney-client's
4 confidentiality because of the crime/fraud
5 exception?

6 A. Yes.

7 Q. Which ones?

8 A. You give them to me and I'll decide.

9 Q. No, no, Father. What I'm entitled to
10 and what I think you're obligated to tell me is
11 whether you have, as part of the basis of your
12 opinion in this case, any such communications in
13 mind as you sit here.

14 A. Well, I think I have. And I mentioned
15 the abuse of the attorney-client privilege when
16 they stamped these scientific documents. Isn't
17 that a clear example? I say here, I will explain
18 this and I think that they have abused the
19 privilege or they seek to abuse the privilege in
20 this case.

21 Q. I know you think that but you don't

22 have any specifics to back it up, do you?
23 A. I do. I have some court decisions and
24 recent court decisions on rulings on fraud, crime
25 and fraud, and that --

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1 (Witness confers with counsel.)
2 THE WITNESS: All right. The Waxman
3 report tells that --

4 BY MR. McCORMICK:

5 Q. Wait just a second. I'm going to
6 object to that and I'm going to reflect that
7 counsel for Father Drinan leaned over and
8 whispered in his year that the Waxman report --

9 A. I'm not going to use that but I have
10 the cases here. Haines versus Liggett which was
11 reversed on technical grounds and Florida versus
12 tobacco company, Minnesota versus Philip Morris.
13 Each of these cases is different. Burton versus
14 R.J. Reynolds and so on. I could name these and
15 describe them and some of them are not fully
16 adjudicated yet but that I think that this is a
17 document of your question.

18 Q. We'll come back to those cases, Father,
19 but you still haven't answered my question and I
20 really would ask that you try to answer my
21 question. What specific attorney-client
22 communications do you know of as you sit here
23 that you think ought to be derived of their
24 attorney-client confidentiality because of the
25 crime/fraud exception?

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1 A. Well, I have adjudicated cases here.
2 Why isn't that a responsive answer?

3 MR. KLUGMAN: That's not the question.

4 BY MR. McCORMICK:

5 Q. It's not the question, that's why it's
6 not a responsive answer. What communications? I
7 didn't ask you about cases. I will ask you about
8 cases. What attorney-client communications that
9 you know of in this case should be deprived of
10 the attorney-client privilege because of
11 crime/fraud? You can't name one, can you?

12 A. I thought that all morning I've been
13 talking about lawyers abusing the privilege, and
14 we have been naming them, about how lawyers have
15 sought to take these documents and ask the
16 benefit of the privilege to which they're not
17 entitled.

18 Q. I'm going to ask this question again.

19 A. All right.

20 Q. Tell me the communication, the
21 attorney-client communication from all these
22 thousands and thousands of documents you've
23 reviewed that you as an expert contend should not
24 have the attorney-client privilege because of
25 crime/fraud.

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1 A. Well, can I mention these instances
2 that are now in adjudication?

3 Q. I want you to mention the specific
4 communications. I don't want you to tell me
5 about a case. I want you to tell me about a law
6 case. I want you to tell me about a specific

7 communication.
8 MR. McCORMICK: Counsel, I would
9 appreciate it if you wouldn't consult with the
10 witness in the middle of a question with a
11 question pending.
12 MR. KLUGMAN: I think the record should
13 note there is a pause now while the witness is
14 reviewing some documents.
15 THE WITNESS: I didn't hear. What?
16 MR. KLUGMAN: There is a pause while
17 you're looking through some documents in an
18 attempt to answer the question. We see from here
19 what the document is but I think the record
20 should reflect what is going on.
21 (Witness reviewing documents.)
22 THE WITNESS: Here is a case in
23 Minnesota where the court in Minnesota required
24 the companies for the first time to submit all
25 150,000 documents to the court for in-camera

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1 review. And then I have other recent cases here
2 in Kansas. The court found that some of these
3 documents may contain evidence that R.J. knew,
4 during the relevant period of time, that nicotine
5 was addictive. I could name other cases where
6 courts have adjudicated this, that they are
7 entitled, at least in camera, to see these
8 documents.

9 BY MR. McCORMICK:

10 Q. What document are you referring to
11 there, Father?

12 A. This is a series of cases. I am sure
13 that you have this. This is a series of cases
14 prepared by someone who is not identified here,
15 recent litigation on this topic.

16 Q. Could I see this?

17 A. (Witness proffers document.)

18 Q. Now, Father, you've cited a case in
19 which there is a proceeding ongoing in Minnesota,
20 correct?

21 A. Yes.

22 Q. That proceeding hasn't reached any
23 conclusion?

24 A. Well, do you want me to name documents
25 in the Texas litigation?

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1 Q. No, Father. I wish you would tell me
2 what's unclear about this question because I
3 don't think anything is.

4 A. It is very unclear. What are you
5 asking me?

6 Q. I'm asking you again now for about the
7 eighth time to tell me any communication, not
8 related to the Texas litigation or the Minnesota
9 litigation, communication between an attorney for
10 a tobacco company and his or her client that you
11 believe shouldn't be privileged because of the
12 crime/fraud exception.

13 A. Well, again, I've been mentioning
14 several of them all morning.

15 Q. Father, if you've told me any of them,
16 with apologies, I've forgotten. I don't think
17 you have but if you have, I apologize. I've

18 forgotten. Will you tell me now any
19 communication that you know of between an
20 attorney and a client that ought to be
21 deprived because of the crime/fraud
22 exception?

23 A. In connection with the scientific
24 research, that lawyers have communications with
25 scientists and with their principals that they

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1 claim are privileged but they're not privilege
2 because they're involved in inducing something
3 that will be erroneous, that will serve the
4 tobacco company by concealing the truth or
5 misleading people.

6 Q. What lawyer, Father?

7 A. The documents are filled with the names
8 of lawyers.

9 Q. Then it should be easy for you to
10 remember one.

11 A. Well, I'm not going to sit here and
12 charge any individual lawyer without all of the
13 facts. But it seems to me here that David Hardy
14 might be done.

15 Q. And again, I understand that you would
16 have to have all the facts and circumstances.

17 A. So the question is unfair. You want me
18 to indict one particular lawyer? This is a
19 pattern or practice of lawyers.

20 Q. But I am entitled to know which lawyers
21 you claim your analysis has demonstrated to your
22 satisfaction were involved in conduct which would
23 warrant finding under the crime/fraud exception.

24 A. I find this difficult, David Hardy's.

25 Q. No, difficult is not the question,

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1 Father. You are not prepared, you just told us,
2 to render a decision based on that document that
3 David Hardy engage in wrongdoing because you
4 don't have all the facts, do you?

5 A. No, I don't. I just said that.

6 Q. So let's put that incident aside.
7 Which lawyer's communications with the client do
8 you think ought to be deprived because of the
9 crime/fraud exception? Which ones?

10 A. Which ones? Well, try all of the cases
11 that I mentioned here, in Minnesota and all. Of
12 course they're adjudicating this.

13 Q. No, what are their names, Father?

14 A. I'll give you the names. I've given
15 you the names.

16 Q. The names of the lawyers now.

17 A. Oh, the lawyers, I don't know.

18 Q. You don't know the name of any
19 particular lawyer that you're prepared to say?

20 A. Not right now at the memo, no, but if I
21 had an hour or two, I could find out the lawyers
22 involved in these cases.

23 Q. Father, you've worked on this case for
24 hundreds of hours, haven't you? You have to
25 answer verbally.

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1 A. Yes.

2 Q. I want to know, based on the hundreds

3 of hours and months of work you've done, as you
4 sit in this here, with the obligations of you as
5 a witness under oath, if you can identify by name
6 a single lawyer whose conduct warrants a finding
7 under the crime/fraud exception.

8 A. I'm not prepared to say that.

9 Q. Can you identify, as you sit here, even
10 if you don't know the name of a lawyer, a
11 specific communication, and by a communication, I
12 mean a letter or I mean a fax or I mean a verbal
13 statement specifically that you believe ought to
14 be deprived because the lawyer who sent that
15 or had that communication was participating in
16 crime/fraud.

17 A. Remember, to repeat, these people have
18 a right to a trial and a hearing and they're all
19 on trial in these cases. So you want me to
20 rehash these cases?

21 Q. No, I want you to tell me if, based on
22 your analysis, you're prepared to indict, as
23 participant in a crime/fraud, any specific
24 conversation or a correspondence and, if so, what
25 it is.

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1 A. I have the five or six cases here. I
2 am prepared, on further study, to go and I would
3 say that these lawyers have violated the
4 privilege. Sir, you're asking me something
5 impossible. You want me to name John Brown.

6 Q. Father, we've already established you
7 can't name John Brown. I've moved on from there.

8 A. All right.

9 Q. You can't tell me a single
10 communication letter from X to Y or single
11 statement specifically where the crime/fraud
12 exception should apply, can you?

13 A. Do you want it to be adjudicated or
14 just my opinion that probably in this case these
15 things should be deprived? I'm giving you
16 authority.

17 Q. Father, you know that as an expert, you
18 can only give an opinion in this case not if it's
19 possible, not on odds, you can only give an
20 opinion in this case if you are satisfied to a
21 reasonable degree of certainty that the facts are
22 correct?

23 A. That's right.

24 Q. Now, to a reasonable degree of
25 certainty, based on your work in this case so

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1 far, are you prepared, as you sit here, to
2 identify any specific communication between a
3 lawyer and a client --

4 A. You mean in the Texas tobacco
5 litigation or in general? Sir, I will repeat
6 again, I am prepared to say that there are many
7 instances where this is a good question and I
8 have a right to reserve my judgment as to all of
9 these people here.

10 MR. KLOK: Counsel, I think if we want
11 to clarify the question, you ought to make
12 mention of the Texas --

13 MR. McCORMICK: Counsel, you don't have

14 standing to make an objection here.
15 MR. KLOK: I'm not making an objection,
16 I'm looking for clarification. It seems to me
17 Father Drinan is confused about whether or not he
18 can comment on tobacco documents produced in
19 Texas litigation and you never answered that
20 question when he asked you.

21 MR. McCORMICK: I did answer it and I
22 will answer it again to make sure there is no
23 confusion.

24 BY MR. McCORMICK:

25 Q. Father, I'm not talking about a

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1 specific litigation. Do you understand that now?

2 A. Yes.

3 Q. Are you clear on that now?

4 A. Yes.

5 Q. I'm talking about communication between
6 clients in the tobacco industry and their
7 lawyers. You understand that? You have to
8 answer yes or no.

9 A. Yes.

10 Q. And my question is this: And I
11 understand you realize there are issues. There
12 are issues raised about the crime/fraud subject
13 in the materials you've raised, correct?

14 A. Yes.

15 Q. And you understand that those issues
16 are going to be adjudicated and some of them are
17 in the process of being adjudicated?

18 A. Yes.

19 Q. And to reach a conclusion as an expert
20 to a reasonable degree of certainty, you would
21 have to have all the facts surrounding those
22 circumstances?

23 A. Yes.

24 Q. And you don't have all the facts
25 surrounding --

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1 A. Correct.

2 Q. And that's true of all of these
3 communications that you've been informed about,
4 correct?

5 A. Probably, yes.

6 Q. Well --

7 A. Yes, correct.

8 Q. So as to all of the attorney-client
9 communications that you've been informed about in
10 your work in this case, you would have to have
11 all the facts, including facts not available to
12 you right now, in order to reach a conclusion to
13 a reasonable degree of scientific certainty,
14 reasonable degree of certainty, not scientific
15 but legal certainty, as to whether there was any
16 crime/fraud committed?

17 A. Correct.

18 Q. Now, with respect to your disclosure --
19 off the record.

20 (Discussion off the record.)

21 (Whereupon, at 12:30 p.m., the
22 deposition in the above-entitled matter was
23 recessed, to reconvene at 1:15 p.m., this same
24 day.)

AFTERNOON SESSION

(1:15 p.m.)

Whereupon,

ROBERT F. DRINAN, SJ,
the witness testifying at the time of recess,
having been previously duly sworn, was further
examined and testified further as follows:

EXAMINATION BY COUNSEL FOR
BROWN & WILLIAMSON (RESUMED)
BY MR. McCORMICK:

Q. A couple of things to clean up from
this morning. I would like to mark for
identification as an exhibit the documents you
have with you today, your record of the time
you've spent on that case. Do you have that
document, please?

A. The total number of hours?

Q. Yes.

A. I haven't added it up but I can get
that to you.

Q. I understand but I would like to mark
as an exhibit the document in its present form.

A. All my scrawlings?

Q. That's all right. And I understand
that it's a work in progress so we'll give this
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back to you but I would just like to mark it as
an exhibit.

A. It would be neater if I could sent it
to you and make a request because this is not
comprehensible.

Q. We'll mark it as an exhibit, we'll
return it to you and then if you wish to provide
it in some different form or update it, that's of
course fine.

A. I would feel much better if I could
have it typed up and mail it to you.

Q. You can do that but I would like to
have that exhibit you brought with you marked.

A. But can I get that back today?

Q. Absolutely. You will leave here with
it.

(Drinan Exhibit No. 6 was
marked for identification.)

BY MR. McCORMICK:

Q. And Father, one other thing. You
mentioned, in connection with your testimony here
concerning your publications, that you had
published a number of articles, and you brought
one of them here with you today, that don't
appear on your resume, correct?

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A. Yes.

Q. Would those be in the approximate
nature of articles?

A. Yes, but not about tobacco.

Q. Not about tobacco, other than the one
you've got here?

A. As far as I know.

Q. And not about legal ethics?

A. Well, you have the one from the Notre

10 Dame thing, from NOCUA. There are only two or
11 three short articles on legal ethics.
12 Q. And which ones would those be and where
13 would we find those?
14 A. Well, I don't know right now but, I
15 mean, if you really want them, I could locate
16 those articles.
17 Q. Well, if you've written and published
18 articles on legal ethics, we request that you
19 provide us those.
20 A. All right.
21 MR. KLUGMAN: Can we just be clear
22 whether Father Drinan is talking about articles
23 that are not on the CV?
24 BY MR. McCORMICK:
25 Q. Yes. We're talking about articles not
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1 on the CV.
2 A. Well, there are no articles on the CV.
3 It's just my nine books.
4 MR. KLUGMAN: We have a list of
5 publications that is quite lengthy.
6 THE WITNESS: I'm sorry, we did send
7 you that, okay. So you have everything. So
8 there is no need for me to -- I had forgotten
9 that.
10 BY MR. McCORMICK:
11 Q. We're going to have to start over now.
12 Would you look at your resume? Do you have a
13 copy of your resume there?
14 A. Yes. I think so, yes.
15 Q. Could you look at it and specifically
16 at the list of publications on it?
17 A. Yes, I have it.
18 Q. You're familiar with it?
19 A. I wrote them.
20 Q. I know you're familiar with the
21 articles. Are you familiar with what's listed on
22 your resume?
23 A. Yes.
24 Q. And there are no articles listed on
25 your resume, or no publications on your resume
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1 dated January 1997 that relate to legal ethics,
2 or are there?
3 A. No, not as such, no.
4 Q. You also mentioned that beyond the
5 publications on your January 1997 resume, that
6 you also have published short articles in
7 journals or newspapers, correct?
8 A. Yes. And I think that Mr. Klugman, is
9 it?
10 MR. KLUGMAN: Klugman, yes.
11 THE WITNESS: You have all those
12 articles. I sent that out. Series of articles.
13 I sent it out a long time ago.
14 MR. KLUGMAN: Didn't send it to me,
15 that's the issue.
16 THE WITNESS: Well, you have it there.
17 MR. KLUGMAN: No, all I'm saying is we
18 have a very lengthy list of publications and
19 Mr. McCormick is trying to find out whether there
20 are more publications than are on that list.

21 THE WITNESS: No, the list is an
22 exhaustive list.

23 BY MR. McCORMICK:

24 Q. Let's come back to that issue.

25 MR. KLOK: And just for clarification,
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1 I do believe that an exhaustive list was sent
2 through liaison counsel, it was Tom Stover that
3 we sent a list of publications that Father Drinan
4 had.

5 BY MR. McCORMICK:

6 Q. Father, putting aside whether it's on
7 one list or another list, have any of your
8 publications -- so far as you can recall here, do
9 any of them bear directly on the subject of legal
10 ethics?

11 A. There's only two or three things in the
12 Journal of Legal Ethics that are quite general
13 obviously that have little if any applicability
14 to what we're talking about today.

15 Q. All right. Father, we spoke in the
16 session this morning about the fact that in order
17 to make a judgment about the conduct of a lawyer,
18 it's important, in fairness, to be knowledgeable
19 about the facts surrounding that circumstance,
20 correct?

21 A. Yes.

22 Q. And wouldn't you agree that it would
23 also be important, indeed necessary, to render an
24 opinion to a reasonable degree of certainty to be
25 familiar with the ethical rules that were

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1 governing that lawyer's conduct at the time that
2 the conduct occurred?

3 A. Certainly, yes.

4 Q. And the rules that govern lawyers'
5 conduct in the various states have changed and
6 evolved like a lot of our rules of law over time,
7 correct?

8 A. To some extent, yes.

9 Q. And certainly there would have been
10 change in at least some states and perhaps all of
11 them in the period covered by the expense and the
12 scope of this case which goes all the way back
13 for over 40 years?

14 A. Yes.

15 Q. And in addition to the rules that are
16 set out by the state bar associations for conduct
17 of lawyers, those rules, like other rules in our
18 common law system, get interpreted by the courts,
19 correct?

20 A. Yes.

21 Q. And those decisions come down and those
22 decisions are judicial decisions which interpret
23 and make interpretations of and rule on specific
24 factual situations under the rules?

25 A. Yes.

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1 Q. And a lawyer, in following his or her
2 profession, has to be familiar not only with the
3 words of the rule but also with the control and
4 legal authorities?

5 A. Yes, sir.

6 Q. And would you agree, Father, that over
7 the course of the time, not only have the rules
8 in these states evolved but of course from time
9 to time there have been judicial opinions
10 clarifying or attempting to clarify those rules?

11 A. Yes.

12 Q. And the custom and practice that
13 develops as a result of the rules and as a result
14 of these opinions that are granted or handed down
15 by courts, the custom and practice in a
16 particular jurisdiction on how lawyers conduct
17 themselves, that also has changed over time,
18 hasn't it?

19 A. At least it has been modified.

20 Q. Now, when you look back over time and
21 the time that you yourself have personally been
22 involved in thinking and writing and talking
23 about these things and you look back over all
24 these rules and the evolution of these rules and
25 the various decisions that have come down over

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1 the rules, would you agree with me, Father, that
2 the picture has not always been clear in all
3 situations how a lawyer is supposed to conduct
4 himself or herself?

5 A. As to the essentials, I think it's
6 clear. On the modifications, there might be some
7 ambiguity.

8 Q. In fact, the whole field has been, as
9 you once wrote, characterized by ambiguity,
10 confusion and incoherence, isn't that true?

11 A. I don't think that's about the whole
12 thing. I think that's one area.

13 Q. Well, let's take a look at what it was
14 and let's come back for that purpose to Exhibit
15 5. Do you still have your copy of that? And
16 Exhibit 5 is the copy of the law review article
17 you wrote for the journal of college and
18 university law just four years ago in 1993, isn't
19 that true?

20 A. Yes.

21 Q. And if you look at page 310, do you
22 have that there with you?

23 A. I do.

24 Q. In the beginning of the first full
25 paragraph, you state that: Criminal cases aside,

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1 what should the nation's standards of legal
2 ethics require of attorneys, question mark.

3 You pose that question, don't you,
4 Father?

5 A. Yes.

6 Q. And your answer is, quote: As noted
7 above, there has been ambiguity, confusion and
8 incoherence on this issue.

9 You wrote that in 1993, didn't you,
10 Father?

11 A. Yes.

12 Q. Now, Father, you realize that in
13 addition to the ethical rules and the decisions
14 associated with those ethical rules, that there
15 are also important choice of law issues when an
16 attorney's conduct is called into question,

17 correct?
18 A. Yes.
19 Q. And in other words, if an attorney is
20 in, say, the state of New York and is rendering
21 advice to a client who is located in the state of
22 California concerning a transaction which takes
23 place in the State of Texas, there are a set of
24 rules and judicial decisions that will attempt to
25 clarify which law, which ethical rules and

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1 procedural rules govern that, correct?
2 A. Yes.
3 Q. And you're not, I take it, purporting
4 to come to this case and render an opinion to a
5 reasonable degree of certainty on what choice of
6 law provisions apply to the ethical lawyer
7 conduct in this case?
8 A. No, because the lawyers are in
9 different locations.
10 Q. And you haven't tried to analyze, in
11 all of these different situations, what the
12 choice of law rule would be, have you?
13 A. No.
14 Q. And it's not your intention to do so in
15 this case, is it?
16 A. It depends. Furthermore, the question
17 is not that important because in the areas
18 relevant to this matter, the rules are
19 substantially the same.
20 Q. Well, Father, the rules are what the
21 rules are.
22 A. Yes.
23 Q. And I understand that's your view but
24 my question was not that. My question was, have
25 you attempted -- let me start over. My question

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1 was, do you intend, as part of your testimony in
2 this case, because if you do, I'm entitled to
3 know it and my client is, to make a determination
4 as an expert on what the choice of law is that
5 applies to any of these lawyer conduct
6 situations.
7 A. The answer is no, unless it becomes
8 necessary to do so.
9 Q. You have no plans to do so at this
10 point, I take it?
11 A. No.
12 Q. Now, Father, again, coming back to the
13 fact which I believe you acknowledge that it's
14 necessary, in order to pass judgment on
15 somebody's ethical conduct, to know the totality
16 of the circumstances. And given the ambiguities
17 and the confusion that has sometimes been the
18 case in connection with ethical rules, is there
19 any situation which, as a matter of a reasonable
20 degree of certainty, you're prepared to say, as
21 an expert, was a violation of the rules?
22 A. Yes.
23 Q. What is that?
24 A. I don't have the document here about
25 the request of the attorney general of Texas to

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1 deprive certain documents in Texas. I have

2 that in my office. I thought that I had it
3 here. I would think that that would give me some
4 indication of cases where the fraud crime
5 exception would not be applicable.

6 Q. Yes, Father. But I'm not talking about
7 the fraud crime exception.

8 A. Your question is?

9 Q. My question was, with respect to a
10 violation of the ethical rules, correct?

11 A. Yes.

12 Q. You understand that your disclosure
13 says that you are being put forth as an expert on
14 the compliance with the ethical rules.

15 A. Yes.

16 Q. So I'm talking about whether lawyers in
17 the tobacco companies have violated the ethical
18 rules. And my question is, taking into account
19 the need for knowledge of all the facts, the need
20 for knowledge of the rules as they applied at the
21 time, have you formed, as a matter of -- to a
22 reasonable degree of certainty, a conclusion that
23 specific lawyers for the tobacco companies
24 violated the ethical rules?

25 A. No.

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1 Q. Do you have opinions, Father, as to --
2 well, let me ask you this. Let me start that
3 question over. Would the same answer apply to my
4 questions to you with respect to the invocation
5 by these lawyers of the attorney-client
6 privilege?

7 A. No, I think that in a moment in time, I
8 probably should be prepared to take the law, all
9 the ethical derivatives and take these facts and
10 if asked, I would say that there has been or has
11 not been any violation of the rules.

12 Q. At an appropriate time?

13 A. That's right.

14 Q. When do you think that might be?

15 A. I don't know. If you bring me a case
16 and if they want my expert opinion as to its
17 applicability to this particular instance.

18 Q. Okay, that's fine. But you understand
19 that the State of Texas is under an obligation to
20 disclose what your opinions are going to be?

21 A. Oh, I know.

22 Q. And the reason we're all here today, on
23 a Saturday no less, is for me to find out and for
24 these other companies represented here to find
25 out what your opinions are, correct?

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1 A. Right.

2 Q. What I want to know is, I understand
3 that if somebody asks you to form an opinion
4 sometime in the future, you would form that
5 opinion?

6 A. Exactly.

7 Q. Whether you would be allowed to do that
8 under the rules or not would be a matter for us
9 to take up with the court.

10 A. That's right.

11 Q. But today, you don't have such
12 opinions, is that correct?

13 A. Such opinions? What do you mean such
14 opinions, about individual lawyers?
15 Q. Correct.
16 A. No. In the Texas litigation, I have no
17 opinions at this time about the ethical nature of
18 lawyer XYZ, no.
19 Q. Whether it be in connection with the
20 Texas litigation or any other representation --
21 A. Exactly.
22 Q. Sorry, again, I apologize but you've
23 got to let me -- that's all right. You have no
24 such opinion, that is, an opinion to a reasonable
25 degree of certainty, about a lawyer having

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1 violated the ethical rules with respect to
2 representation of the tobacco industry?
3 A. That's correct.
4 Q. Now, Father, in your disclosure, if you
5 have it there --
6 A. I do.
7 Q. One of the other things that you state
8 is that you were going to address the issue, and
9 if you look at the third paragraph on page 1,
10 sort of in the middle, you're going to address
11 the issue of what's called here, quote, the
12 attorney privilege/confidentiality, closed
13 quote. Do you see that language?
14 A. Yes.
15 Q. And by attorney privilege/
16 confidentiality, can you explain what that term
17 means?
18 A. Let me read the whole sentence: Father
19 Drinan will show how the tobacco industry's
20 lawyers inappropriately invoked the use of the
21 attorney privilege/confidentiality.
22 I suppose it means what it says, that
23 the attorney privilege/confidentiality, certain
24 things are privileged, which amounted to the
25 deliberate hiding, shielding and/or destruction

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1 of important health information.
2 Well, it's part of the phrase there:
3 inappropriately invoked the use of the
4 attorney-client privilege or privilege of
5 confidentiality.
6 Q. You're referring there to the
7 attorney-client privilege?
8 A. Model rule 1.6, sir.
9 Q. And also to the work product privilege?
10 A. Yes, that's included, I would think.
11 Q. Those two things?
12 A. They go together.
13 Q. Anything else referred to there?
14 A. No, I don't think so.
15 Q. Let me start with the subject of the
16 attorney-client privilege. This is a matter on
17 which you have written in the past, correct?
18 A. Yes.
19 Q. And it's a matter that you've studied
20 and taught in the past, correct?
21 A. Yes.
22 Q. And a matter on which you hold yourself
23 out to be an expert?

24 A. That's right.
25 Q. You know, as someone who has studied in
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1 this area, don't you, Father, that the
2 attorney-client doctrine or the attorney-client
3 privilege is extremely important in our society
4 and in our judicial system?

5 A. Absolutely, yes.

6 Q. In fact, it is one of the most
7 important doctrines in our judicial system, isn't
8 it, Father?

9 A. I agree.

10 Q. In fact, you wrote once, did you not,
11 that the preservation of the attorney-client
12 privilege is the most cherished goal of
13 professional responsibility?

14 A. Sounds good.

15 Q. And you agree with that, don't you?

16 A. Oh, yes.

17 Q. You aren't the only one who has reached
18 that conclusion. You're familiar with the
19 United States Supreme Court's decision in the
20 Upjohn case?

21 A. Yes.

22 Q. And with the testimony in that case to
23 the fact that preserving the privilege of
24 communication between attorney and a client goes
25 right to the heart of our system of justice,

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1 doesn't it?

2 A. Yes.

3 Q. Now, again, as with legal ethics issues
4 generally, Father, you would agree, wouldn't you,
5 that issues of the attorney-client
6 confidentiality are often very difficult for a
7 lawyer to know exactly what the rules require and
8 what they don't, correct?

9 A. If he wants to find out, I think he can
10 in a particular jurisdiction. I don't know how
11 easy they are to find. They certainly can be
12 found. It may be difficult to apply them in all
13 circumstances.

14 Q. But if you were looking at a situation,
15 if someone were called to try to look at an
16 attorney-client confidentiality situation, that
17 would be a subject that would be very heavily
18 fact sensitive?

19 A. Yes, I agree.

20 Q. It would not be a subject that would be
21 given to certainties or absolutes, would it,
22 Father?

23 A. There is some absolutes, some
24 certainties.

25 Q. There are some absolutes and some

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1 certainties in life with respect, and again, if
2 you would look at your article, and what's the
3 exhibit number on that article, please, Father?

4 A. 5.

5 Q. If you would look at Drinan Exhibit 5,
6 which is your law review article, and
7 specifically at page 309, do you write in this
8 article, in the last paragraph before heading 4,

9 quote: The confidentiality debate will not
10 likely be resolved in the near future. The
11 issues are often intractable, heavily fact
12 sensitive and not given to certainties or
13 absolutes, end of quote.

14 Did you write that in this law review
15 article, Father?

16 A. I did. But you must see that in
17 context of everything around it.

18 Q. Yes. The context is specifically, as
19 the heading says, on the subject of lawyer-client
20 confidentiality, is that correct?

21 A. Yes.

22 Q. Again, with an idea toward the
23 fact-sensitive nature of these inquiries and the
24 ambiguities and uncertainties that you refer to
25 in this article, are you prepared, to a

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1 reasonable degree of certainty as an expert here,
2 Father, to say that any particular
3 attorney-client privilege should not be
4 sustained?

5 A. Yes.

6 Q. Which ones?

7 A. You mean in the whole record of the
8 Texas litigation? We had this before lunch and
9 I'm not certain really what you want.

10 Q. Before lunch, we talked about the
11 crime/fraud exception.

12 A. Uh-huh.

13 Q. And I'm not referring to that.

14 A. All right.

15 Q. We've talked about that. Now I'm
16 talking about the issues of whether a
17 communication between an attorney and a client is
18 properly claimed to be privileged in the first
19 place.

20 A. The key word is properly.

21 Q. Correct. Exactly. And what I'm asking
22 you is, as an expert here today, are you prepared
23 to testify with a reasonable degree of certainty
24 as to any particular attorney-client
25 communication as to which privilege has been

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1 claimed that you don't think it's proper?

2 A. I think there are many cases that are
3 now in adjudication in Texas where the plaintiffs
4 say this should be deprivileged. And I don't
5 have that list here. I'm not certain that I'm
6 entitled to use it because it's still
7 privileged. But I think in some of those
8 instances, there is a reasonable, arguable case
9 that the privilege did not attach because the
10 intent was corrupt from the beginning, that they
11 didn't have the purpose of protecting this for
12 the reasons of the attorney-client privilege,
13 they wanted to protect this for their own reasons
14 of keeping this information from other people.

15 Q. Because that's what I want to get at.
16 My question to you is, Father, as you sit here
17 today, on the basis of the work you've done so
18 far, have you reached an opinion, to a reasonable
19 degree of certainty, as to which of those

20 communications, writings or verbal communications
21 were not properly claimed to be privileged?
22 A. When I read this book, that I'm not
23 entitled to use because it's still privileged, my
24 mind said yes, in some of those cases, that
25 privilege was improperly, inappropriately invoked

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1 and that the privilege never attached because
2 they didn't have the appropriate reason for it.
3 This was done for their own selfish purposes, for
4 fraud, for tort, which I remember is in the law
5 in Texas, that is, attorney-client fraud and
6 tort. That's in Texas law. And that there is
7 something in Texas law like that.

8 In any event, coming back, yes, I'm
9 prepared to say that some of those cases should
10 be deprivileged.

11 Q. What case in Texas use that language,
12 crime/fraud quote?

13 A. I'm called on that. I know it is
14 somewhere.

15 Q. These lawyers told you at lunch?

16 A. They did. They reminded me.

17 Q. But you don't know that of your own?

18 A. I knew that before. That's why I
19 acquiesced in the assertion of that rule of tort.

20 Q. You cannot cite me here --

21 A. The case, no. I'm sorry.

22 Q. Let me finish. As an expert,
23 supposedly, in this subject, you can't cite me a
24 single case or a single statute or any other
25 thing that says that that is the appropriate

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1 formulation of the exception in Texas crime/fraud
2 tort, can you, Father?

3 A. I can't cite you right now but there is
4 there is something there in Texas law to that
5 effect, yes.

6 Q. Let me come back to this book you read
7 which you know you shouldn't have read because
8 some of the material was privileged, correct?

9 A. Yes.

10 Q. All right.

11 A. No, I was permitted to read it but I
12 can't talk about it.

13 Q. Well, let me come back now. But my
14 question is, as you sit here today in that chair
15 under oath as an expert tendered to give his
16 opinions, can you tell me one specific
17 communication, either a writing or a verbal
18 communication, as to which you believe that the
19 privilege has been improperly invoked?

20 A. I can tell you Tuesday. I need to
21 refresh my recollection and look at those, look
22 through those. And I am not certain that I
23 marked some of them but my recollection is that
24 when I did that, I said, yeah, that probably is
25 not entitled.

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1 Q. Father, would you please listen to my
2 question? We'll discuss on Tuesday what we
3 discuss on Tuesday. My question is today, which
4 is Saturday, not Tuesday, today, Saturday, the

5 4th of October, 1997, can you tell me, with a
6 reasonable degree of certainty, any
7 communication, any writing or any verbal
8 statement or communication, as to which privilege
9 is improperly claimed by the tobacco industry?

10 A. Not to my recollection at this moment.

11 Q. Now, Father, you are also, I believe,
12 familiar and are planning to testify about the
13 work product rules, correct?

14 A. Yes.

15 Q. And you contend here, I take it, that
16 you are familiar with the rules and the case law
17 concerning the work product doctrine?

18 A. Yes.

19 Q. And so that everybody understands what
20 we're talking about, and I'll try to say this as
21 best I can and you correct me if it needs
22 correcting but the work product doctrine says
23 that when I'm representing my client, the work
24 that I do, my investigation and my mental
25 processes as a lawyer while I'm in the course of

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1 representing my client, except under exceptional
2 circumstances, cannot be discovered by the other
3 side. They can't make me turn over the work that
4 I've done as a lawyer preparing to represent my
5 client?

6 A. That's right, yes.

7 Q. Specifically with respect to -- well,
8 let me come back to something you testified from
9 your own personal experience. You have, I
10 gathered from your earlier testimony, served in
11 cases not related to the tobacco industry but
12 you've served in cases where you were a
13 consultant with lawyers who were representing
14 some client, is that correct?

15 A. Yes, that's right.

16 Q. And you understand that under the
17 Federal Rules -- to use an example, Federal Rule
18 26(b), that a lawyer who is representing a client
19 in litigation -- if you want to write down the
20 cite.

21 A. I'm learning, sir.

22 Q. If you want to be precise, it's
23 26(b)(4)(a) and (b). Let me start my question
24 over. You understand that a lawyer who is
25 representing a client, for instance, in

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1 litigation or in some other proper legal
2 proceeding, has a right under the rules to go out
3 and to retain expert consultants, much as you
4 were retained in some of those cases?

5 A. Yes.

6 Q. And they're entitled to go out and
7 retain those consultants and to do work for them
8 and to help them understand specific, whether it
9 be science or ethics or anything else, and to
10 work with them in preparing the representation?

11 A. Yes.

12 Q. And you understand that under rule
13 26(b)(4), except under extraordinary
14 circumstances, the work that you did as a
15 consultant consulting with that lawyer is

16 protected under the work product doctrine from
17 discovery?

18 A. Yes.

19 Q. If you become a testifying witness in a
20 case where you're going to get on the stand and
21 give an opinion as an expert in open court, the
22 rules are different?

23 A. Yes.

24 Q. At that point, I'm entitled to come in,
25 as I'm in the process -- as I am doing here

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1 today, to take discovery and find out your
2 communications and your conclusions?

3 A. Yes.

4 Q. But under 26(b)(4), I can retain a
5 consulting expert who is working with me on the
6 defense of the case and the other side can't come
7 in and learn anything about what that consultant
8 has said?

9 A. Yes.

10 Q. And in fact, it is the case, isn't it,
11 Father, that if I were representing a party in a
12 product liability case, hypothetically, I could
13 retain a consultant scientist to do studies for
14 me -- let me start that question over.

15 If I were representing a party in a
16 product liability case, I could retain, as a
17 consultant, a scientist to do testing for me and
18 to educate me and that would be protected against
19 discovery under the Rules, wouldn't it?

20 A. Yes.

21 Q. And if, hypothetically, let's say I
22 were representing an asbestos case where asbestos
23 was accused of having caused somebody's injury,
24 under the Rules of Civil Procedure, I could hire
25 a consultant to do testing in connection with the

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1 science and evidence in that case and if I didn't
2 like the outcome, I could suppress that and never
3 reveal it, correct?

4 A. Right.

5 Q. And the rules specifically permit me to
6 do that?

7 A. Yes.

8 Q. You mentioned to me that you have
9 met -- I'm sorry, you've never met Mr. Motley,
10 correct?

11 A. No.

12 Q. But you know who he is?

13 A. Yes.

14 Q. And you know that he's a lawyer for the
15 State of Texas, correct?

16 A. Yes.

17 Q. And did you, as a result of your work
18 in this case, learn that Mr. Motley was coauthor
19 of a book on -- I'm sorry, a chapter of a book on
20 medical/legal aspects of asbestos-related
21 diseases?

22 A. No, I didn't know that.

23 Q. But it wouldn't surprise you because
24 you know he knows a lot about asbestos?

25 A. Yes.

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1 Q. And in this book, in this chapter,
2 Mr. Motley writes, under the Rules of Civil
3 Procedure, a party may use a favorable long
4 burden assessment as evidence while suppressing
5 an undiscoverable work -- as undiscoverable work
6 product an unfavorable report. You would agree
7 with that?

8 A. I think so.

9 Q. I have used as an example, Father, a
10 situation where I was representing a client in an
11 actual lawsuit, an asbestos case or some other
12 lawsuit. Those were my examples so far, correct?

13 A. Uh-huh.

14 Q. But in the event that, let's say, and
15 I'm going to give you another hypothetical, a
16 government agency was seeking to propose
17 regulations on my client and I was hired to
18 advise the client with respect to its rights
19 under the law in connection with that agency's
20 efforts to impose regulations, again, as a lawyer
21 and a nonscientist, I would have every right
22 under the rules to go out and hire, again, as a
23 consultant, someone to educate me and to work
24 with me in that representation?

25 A. Yes.

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1 Q. And that would be perfectly correct?

2 A. Yes.

3 Q. I have asked you this question with
4 respect to crime/fraud, with respect to ethical
5 violations generally and with respect to the
6 attorney-client privilege. I now want to ask you
7 this question with respect to the work product
8 privilege. Recognizing the fact intensity of
9 these issues, is there any situation which you
10 today are prepared as an expert witness to a
11 reasonable degree of certainty -- is there any
12 situation in which you're prepared to say that
13 the tobacco industry wrongly asserted the work
14 product privilege?

15 A. I think in the instances where they
16 took the scientific document they didn't like and
17 put it into the attorney-client privilege, that's
18 not entitled to the work product immunity.

19 Q. If that happened -- your position is
20 that if that happened, it wouldn't be entitled to
21 work product immunity?

22 A. That's right.

23 Q. But my question was a little
24 different. My question is, am I correct that
25 today, as a matter of reasonable degree of -- let

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1 me start that over.

2 Am I correct that today, Father, you
3 cannot, as an expert, to a reasonable degree of
4 certainty, identify any specific instance in
5 which work product privilege was wrongly claimed
6 by the tobacco industry?

7 A. No, but I think that there are many
8 instances, that it's all through the literature,
9 that they did in fact get scientific conclusions
10 that they didn't like and they wanted to suppress
11 them and they used or misused the work product

12 doctrine.
13 Q. But if there are so many examples,
14 Father, all through the literature, then why
15 can't you give me a single example?
16 A. I could have brought tons of
17 literature. I just go and pull one out.
18 Q. And I understand that. And we're going
19 to actually -- I'm going to show you some
20 specific documents and ask you your opinions on
21 them.
22 A. All right, good.
23 Q. But right now, I just need, and I think
24 I'm entitled to get, a direct answer to this
25 question. As you sit here, there is no specific

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1 instance that you can testify to as an expert in
2 which the work product privilege has been wrongly
3 asserted?
4 A. I can't give you a specific name. I
5 know that if I had all my documents here, I could
6 find some.
7 Q. Now, Father, one of the documents that
8 you were supplied in this case, which is a
9 privileged document, is a memo from Mr. J.K.
10 Wells. Do you know who he is?
11 A. Yes, I do.
12 Q. A lawyer at Brown & Williamson?
13 A. I know.
14 Q. So Mr. Earnest Pepples. Do you know
15 who he is?
16 A. I know Mr. Pepples well.
17 Q. You know him personally?
18 A. No, I know who he is.
19 Q. Also a lawyer at Brown & Williamson?
20 A. That's right.
21 Q. Mr. Pepples and Mr. Wells were two
22 lawyers employed on the staff of Brown &
23 Williamson?
24 A. Yes.
25 Q. And you were shown a memo from

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1 Mr. Wells to Mr. Pepples discussing legal issues,
2 correct?
3 A. Yes.
4 MR. KLOK: Again, because this is a
5 privileged document -- once again, the State
6 takes issue with the idea that that document is
7 privileged but the defendants at their own peril
8 show this document and at least the State's
9 position is that privilege is waived, if they
10 raise any issue of privilege.
11 BY MR. McCORMICK:
12 Q. I'm not going to mark this but just for
13 the record, it's a November 9, 1979 memo from
14 J.K. Wells to Earnest Pepples. Do you see that?
15 Do you see that, Father?
16 A. I'm reading this, yes. I think I've
17 seen this before.
18 MR. KLOK: Father, you're entitled to
19 read the whole document in order to understand
20 what the questions are.
21 THE WITNESS: May I ask what the
22 question will be?

23 BY MR. McCORMICK:

24 Q. Right. You need to know the question
25 before you know whether you need to read the

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1 whole document. My question to you is, is this a
2 document that was shown to you in connection with
3 your work in this case?

4 A. I think it was.

5 Q. And I'll represent to you it was a
6 document included in the box of materials.

7 A. Yes, I have it.

8 Q. This document, Father, makes a
9 reference to, if you look down there at the third
10 paragraph, he says: I recommend a second
11 alternative, which would be that all B.A.T.
12 scientific reports be shipped directly to
13 Dr. Esterle under a formal arrangement that
14 Dr. Esterle was assigned to be your agent for the
15 acquisition of scientific materials in
16 anticipation of litigation.

17 Do you see that?

18 A. Yes.

19 Q. Dr. Esterle would separate the reports
20 which were relevant to smoking and health or
21 otherwise sensitive for handling as described
22 below and place the routine reports into regular
23 R&D circulation. Do you see that?

24 A. Yes.

25 Q. Now, Father, this was, I believe, one
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1 of the articles that was mentioned in connection
2 with the JAMA article.

3 A. Yes.

4 Q. And is this an example which you
5 believe raises a question about the improper
6 assertion of the work product privilege?

7 A. It does.

8 Q. You are not, however, contending, as
9 you sit here today, Father, and based simply on
10 this document, that there was in fact an improper
11 assertion of work product made?

12 A. Sir, I read this and this didn't enter
13 into my mind because I'm not going to use the
14 privilege. I'm not going to collide with that.
15 Consequently, I read this but automatically, I
16 said, that's out of my mind, I can't use that.

17 Q. You're not relying on that?

18 A. Apparently not.

19 MR. KLOK: I would like to make a point
20 of clarification that the State's position is
21 that those documents are part of the public
22 domain.

23 THE WITNESS: You say they have been
24 deprivileged?

25 MR. CLARKSON: Yes.

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1 MR. KLOK: That's the position of the
2 State.

3 BY MR. McCORMICK:

4 Q. Now, Father, let me then ask you this
5 as a hypothetical. If I, as a lawyer, made a
6 proposal to somebody else in my law the president
7 where I said, why don't we have somebody assigned

8 as an agent of the law department and then when
9 they receive scientific reports, that could be
10 said to be attorney work product, all right?
11 That's my hypothetical.

12 Now, would that be a proper assertion
13 of the work product privilege?

14 A. I would have to know what the document
15 is and whether this is done in anticipation of
16 litigation or whether they just want this to
17 disappear.

18 Q. Right. You would have to know a lot
19 more facts than that?

20 A. That's right.

21 Q. And you can't say, just looking at a
22 recommendation, that somebody be appointed as the
23 agent for the law department in anticipation of
24 litigation; you can't say whether that was good
25 advice or bad advice on the face of that

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1 document?

2 A. Except my recollection of that is that
3 there is something fishy about this. They want
4 this to disappear and they say in anticipation of
5 litigation, have this other person. It doesn't
6 sound right.

7 Q. I understand that you think it's
8 suspicious.

9 A. Right.

10 Q. And perhaps that's a fair judgement,
11 Father, or perhaps it isn't. But my question is
12 not whether it's suspicious. Assuming that they,
13 in good faith, were acting in anticipation of
14 litigation, that would be appropriate advice,
15 wouldn't it?

16 A. Probably.

17 Q. And again, going back to Mr. Wells and
18 Dr. Esterle, and putting aside this document, but
19 just generally, you've heard of Mr. Wells and
20 you've heard of Mr. Pepples and this document
21 refers to a Dr. Esterle, correct?

22 A. Uh-huh.

23 Q. You have to --

24 A. Yes.

25 Q. Sorry. You're not aware, are you,

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1 Father, of any scientific study as to which
2 Brown & Williamson as claimed work product
3 privilege based on Mr. Esterle receiving that
4 document, are you?

5 A. I don't know of offhand anyone now but
6 they may have. I'm not certain.

7 Q. I understand. But you don't know of
8 any?

9 A. At the moment.

10 Q. You don't, of course, pretend to reach
11 any conclusion here about whether or not
12 Mr. Wells was acting consistent with his
13 conscience when he wrote this memo, do you?

14 A. I'm not in a position to make that
15 judgment.

16 Q. And you're not in the position -- by
17 the way, Mr. Wells, I'll tell you, cites here a
18 provision of the Kentucky revised statutes. And

19 you're not familiar with that statute, I assume?
20 A. No, I'm familiar with the Kentucky
21 Institute for the Study of Tobacco and Human
22 Health. That's another thing. Go on.
23 Q. Well, let me come back to my question,
24 Father. When Mr. Wells was discussing the
25 possibility of having this arrangement, he cites

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1 as authority for this arrangement a provision of
2 the Kentucky Revised Rules of Civil Procedure.
3 And you didn't go back and look at that rule or
4 study what that rule was?

5 A. No. What did the rule say?

6 Q. I don't know. He just cites the rule.

7 A. I don't know.

8 Q. Let me ask you also, one of the other
9 documents, and you have your copy of this. I
10 don't know. I don't have another copy of it, I
11 don't believe, and I'm sorry, but one of the
12 other documents that I believe you were supplied
13 was a brief titled the State of Texas' Motion to
14 Compel Disclosure of Allegedly Privileged
15 Documents.

16 A. I think I do, yes.

17 Q. And you read that document?

18 A. I assume I did.

19 Q. There is a reference in this document,
20 Father Drinan, that I would -- again, recognizing
21 that this in fact is a privileged communication
22 or I believe it's a privileged communication --
23 it's in this brief which was supplied to you so
24 I'm going to ask you about it. There is a
25 reference to a statement by an attorney by the

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1 great many of Ed Jacob. Is that name familiar to
2 you?

3 A. Doesn't ring -- I'm not certain.

4 Q. Well, there is a reference at page 25
5 of this brief to a lawyer by the name of Ed Jacob
6 in which he's quoted as having made the following
7 statement: Quote, with Spielgerger, we were
8 afraid of discovery for FTC and Aviado, we wanted
9 to protect it under the lawyers, period. We did
10 not want it out in the open, end of quote.

11 Now, Father, I don't know whether you
12 would remember reading that sentence or not and
13 I'm not going to ask you whether you do or not
14 but having now been refreshed as to that
15 sentence, are you in a position to draw any
16 conclusions as an expert to a reasonable degree
17 of certainty as to whether that statement by
18 Mr. Jacob constitutes an improper assertion of
19 the work product privilege?

20 A. I'm not in a position to know his
21 conflicts background or to make any judgment.

22 Q. You would have to know who Spielgerger
23 was and what he did, correct?

24 A. And what the motive was.

25 Q. And what Mr. Jacob's motive was,

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1 correct?

2 A. Yes.

3 Q. And you would have to know who Aviado

4 was and what he did, correct?

5 A. I remember that name in the tobacco
6 papers.

7 Q. And you would have to know what the
8 discovery was they were referring to and what
9 their obligations were?

10 A. And what the power of the Federal Trade
11 Commission was.

12 Q. Correct. And if -- I'm just going to
13 ask you this hypothetically. If they were
14 talking about people who were retained to help
15 Mr. Jacob, specifically in defense of his client,
16 consulting experts who were hired to assist him,
17 it would be entirely permissible, under the
18 Federal Rules and under the rules of every state
19 you're aware of, to shield that from discovery,
20 correct?

21 A. Even by the FTC?

22 Q. By anybody.

23 A. I mean, that's the rule.

24 Q. Yes.

25 A. Okay.

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1 Q. And do you agree with that?

2 A. Under your facts, it seems acceptable.

3 MR. KLUGMAN: I'm sorry, I didn't hear
4 the last word. It seems --

5 THE WITNESS: Acceptable.

6 MR. KLUGMAN: Thank you.

7 MR. KLOK: Would this be a good time to
8 take a break?

9 MR. McCORMICK: Whenever you want.

10 MR. KLOK: I think it would be a good
11 time to take a break.

12 MR. McCORMICK: All right.

13 (Recess.)

14 MR. McCORMICK: Would you mark this as
15 the next exhibit.

16 (Drinan Exhibit No. 7 was
17 marked for identification.)

18 BY MR. McCORMICK:

19 Q. Father, for the record, I'm handing you
20 what's been marked as Drinan 7 which is a
21 document dated January 10, 1985 from
22 Mr. Pritchard to a Mr. Hardwick. And that
23 document is one of the documents that you were
24 supplied in connection with your testimony in
25 this case, correct?

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1 A. Yes.

2 Q. Well, Mr. Pritchard makes a request to
3 Mr. Hardwick in this memo that reports in Exhibit
4 7, Father, you see that Mr. Pritchard requests
5 Mr. Hardwick to send reports and materials that
6 are going to be distributed to Brown & Williamson
7 to a Mr. Robert L. Maddox at the Wyatt, Tarrant &
8 Combs law firm. Do you see that?

9 A. Yes.

10 Q. Do you recall this as one of the
11 documents you reviewed?

12 A. Sir, on those documents I did receive a
13 package, a large package on Wednesday or Thursday
14 that I have not reviewed. That may or may not

15 include this. But go on.

16 Q. Wednesday or Thursday of this week?

17 A. Of this week. And I was in Cleveland
18 all day Friday -- and in any event, it's not my
19 fault they came Wednesday or Thursday, and they
20 are there in the office.

21 MR. McCORMICK: Do we have those
22 documents?

23 MR. KLOK: Those are the documents we
24 were referring to in the supplement earlier just
25 before we took a break. He has not had a chance
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1 to review the supplements.

2 MR. McCORMICK: Let's go off the record
3 here.

4 (Discussion off the record.)

5 BY MR. McCORMICK:

6 Q. I'll come back to the Hardwick document
7 in a minute, Father, but we received a letter
8 this week from counsel for the State of Texas
9 that says: Please incorporate the State of
10 Texas' supplemental memorandum of law in
11 opposition to defendant's claim of privilege with
12 exhibits as a document Father Drinan will include
13 as a basis for his opinion.

14 Is that what you have just referred to
15 as the documents that were sent to you this week?

16 A. What's the date on there?

17 Q. It's dated October 1.

18 A. It could be, sir.

19 MR. KLOK: Those are the documents he
20 was talking about.

21 BY MR. McCORMICK:

22 Q. So these documents that are referred to
23 in this letter of October 1, you have not yet
24 reviewed those documents?

25 A. Apparently not. No.

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1 Q. Well, there is no misunderstanding the
2 documents that you received this week from
3 counsel that are reflected in October 1, you
4 haven't had a chance to read those?

5 A. Apparently not. No.

6 Q. You say apparently not?

7 A. Well, I don't know exactly. I read
8 them whenever they come in. If material came on
9 Wednesday or Thursday, I was not in a position to
10 read it. But I don't think it's very material to
11 what we are doing.

12 Q. Well, it may or may not be, Father.
13 Did you receive on Wednesday or Thursday or
14 Friday of this week some additional materials?

15 A. I did.

16 Q. Father, you must let me finish. I'm
17 sorry.

18 A. I'm sorry.

19 Q. Did you receive on Wednesday, Thursday,
20 or Friday from counsel for Texas some additional
21 materials to review?

22 A. I did.

23 Q. And you haven't had a chance to review
24 those?

25 A. That's right.

1 MR. McCORMICK: And, Counsel, are we in
2 agreement that the materials that he received
3 were the ones referred to in your October 1
4 letter?

5 MR. KLOK: Correct. Those are the
6 materials that we have sent most recently and he
7 has not had an opportunity to review those.

8 MR. McCORMICK: He doesn't let me
9 finish either.

10 BY MR. McCORMICK:

11 Q. Father, if we could go back to the
12 Hardwick report.

13 A. We are on the letter to Mr. Pritchard.

14 Q. This letter is a request that reports
15 materials to be distributed to Brown & Williamson
16 should be sent to Mr. Robert L. Maddox of the
17 Wyatt, Tarrant firm in Louisville, correct?

18 A. Yes.

19 Q. And if I understand, before we got
20 distracted, you had told us that you believe this
21 is one of the documents you had already reviewed?

22 A. Yes.

23 Q. Now, from looking at this document and
24 its context, it's just one short paragraph,
25 Father, I assume you have not reached and could

1 not reach any conclusion of any wrongdoing on
2 behalf of either Mr. Pritchard or Mr. Hardwick or
3 Mr. Maddox?

4 A. I haven't reached a firm conclusion,
5 but I wonder what he means when he says this firm
6 should not be listed as a distributee in the
7 documents nor should B&W.

8 Q. I understand that's what the document
9 says, Father. But you don't know whether in fact
10 any documents were ever sent to Mr. Maddox in
11 connection with this request, do you?

12 A. It's not clear from this document.

13 Q. Well, whether from this document or
14 otherwise, you don't know whether there were in
15 fact any such documents were sent to Mr. Maddox,
16 do you?

17 A. Except Mr. Pritchard said documents
18 sent to Maddox should be distributed and I can
19 assume documents were sent to Maddox.

20 Q. But you don't know one way or the
21 other, other than that assumption?

22 A. That's my assumption. You're right.

23 Q. And if they were sent to Mr. Maddox and
24 Mr. Maddox reviewed those documents for whatever
25 purpose and passed them on without making any

1 changes to them to Williamson personnel, there
2 wouldn't be anything wrong with having Mr. Maddox
3 do that, would there?

4 A. If the facts are innocent, all right,
5 but if the facts are as I suggest to you that
6 there is something deceptive about this, that
7 they want to conceal certain things -- I don't
8 know, sir, from this one paragraph.

9 Q. Do you know from anything that you have
10 reviewed whether or not any report was ever

11 changed or withheld from anyone as a result of
12 this request?

13 A. I do know that certain documents were
14 made to disappear or they made them certainly
15 unavailable to people or very difficult to
16 retrieve.

17 Q. You are talking about deadwood now?

18 A. Deadwood and maybe some other
19 circumstances.

20 Q. We'll come back to that, Father. What
21 I'm talking about is that according to this
22 letter, this letter would suggest that at one
23 point in time, at least at one point in time in
24 the mid 1980s, that Mr. Robert Maddox, a lawyer,
25 and you understand he is a lawyer?

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1 A. Yes.

2 Q. Mr. Robert Maddox, a lawyer with the
3 Wyatt Tarrant firm reviewed certain materials
4 that were sent to him by the British American
5 Tobacco Company, correct?

6 A. Yes.

7 Q. And you have no knowledge, do you,
8 Father, that as a result of those reviews any
9 report was ever changed or ever kept from its
10 intended final destination?

11 A. I have no specific knowledge from this
12 one letter.

13 Q. Do you have any specific knowledge from
14 anything else that Mr. Maddox caused any report
15 to be changed?

16 A. I can't say about Mr. Maddox but the
17 tobacco papers certainly seem to include
18 documents to the effect that this was their
19 intention of making documents unavailable or
20 difficult.

21 Q. By the tobacco papers, you are talking
22 about the JAMA article?

23 A. Yes.

24 Q. I'm not here interested so much in what
25 the board of editors of the American Medical

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1 Association may think. You understand that?

2 A. Yes.

3 Q. If they want the board of the Medical
4 Association to come testify, they can ask them to
5 come testify, correct?

6 A. Yes.

7 Q. But they haven't asked them to come
8 testify, right?

9 A. Yes.

10 Q. They have asked you to come testify.
11 All I'm asking you about is the opinions that you
12 have formed under the rules as an expert to a
13 reasonable degree of certainty. Now, let me come
14 back to my question. You do not know of -- in
15 fact, there is not a single instance in this
16 record of evidence that Mr. Maddox made any
17 change in any report that was sent to him, is
18 there?

19 A. Apparently not.

20 Q. And there is no evidence in this record
21 that any report that Mr. Maddox reviewed was

22 withheld from discovery or withheld from anybody
23 that it was supposed to go to, is there?
24 A. It's not provable from this letter. It
25 might be provable from other sources.

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1 Q. A lot of things might be. I'm asking
2 you what you know based on your investigation.

3 A. On this letter, no.

4 Q. Or any other part of your
5 investigation?

6 A. Whether information was permanently
7 disappeared?

8 Q. Correct. As a result of Mr. Maddox
9 having reviewed these reports.

10 A. Right now I'm not in a position to say
11 yes or no.

12 Q. Another incident that you referred to,
13 Father, was earlier in the deposition, was a
14 document that has come to be referred to as the
15 deadwood memo, and you are familiar with that
16 document, aren't you?

17 A. Yes.

18 MR. McCORMICK: Would you mark that as
19 the next exhibit.

20 (Drinan Exhibit No. 8 was
21 marked for identification.)

22 THE WITNESS: Let me pause for a moment
23 to read this carefully, all right?

24 MR. McCORMICK: Of course.

25 THE WITNESS: Go ahead.

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1 BY MR. McCORMICK:

2 Q. Father, in this document, to sum it up,
3 Mr. Wells notes that in consultation with
4 Mr. Kohnhorst, do you know who Mr. Kohnhorst was?

5 A. I know his name, yes.

6 Q. He was the engineering and R&D director
7 of the superior.

8 A. I see.

9 Q. In connection with Mr. Kohnhorst, that
10 he had made recommendations concerning a group of
11 research reports or other documents that were
12 contained in the company files that he describes
13 at one point in this as deadwood, correct?

14 A. Yes.

15 Q. And he represents that those be
16 gathered up?

17 A. Yes.

18 Q. Correct?

19 A. Yes.

20 Q. Now, you don't have an opinion or a
21 position here based on the work you have done in
22 connection with this case that it was improper
23 for Mr. Wells to make that recommendation, do
24 you, Father?

25 A. I read it with care and with a certain

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1 suspicion when he calls these deadwood, there's
2 many ways of getting rid of deadwood. You can
3 send them back to the authors, you can put them
4 in the warehouse, or you could just destroy them.
5 I think it centers around the definition of
6 deadwood. If he authentically said, We don't

7 need these anymore, these are irrelevant, just
8 destroy them, just burn them, if it's really
9 deadwood.

10 But I get the idea here that -- where
11 we don't really want to get rid of them entirely,
12 we want to retain them. Consequently, they are
13 not deadwood, so I just wonder why this elaborate
14 arrangement for documents which are allegedly of
15 no use anymore.

16 Q. Father, you wonder that and the
17 document raises that question?

18 A. Exactly.

19 Q. But you have not reached a conclusion
20 to a reasonable degree of certainty that there
21 was something improper in him making that
22 suggestion, have you?

23 A. Simply because I don't have what went
24 before and what went after.

25 Q. I want you to assume, Father -- well,

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1 let me, before I do that, I ask you to look at
2 the second page of the document. On the second
3 page of the document, in the middle paragraph,
4 second sentence, he says: I said that we would
5 consider shipping the documents to BAT when we
6 had completed segregating them.

7 Do you see that language?

8 A. Yes.

9 Q. And that was the source of the
10 reference that you made earlier in your
11 deposition about sending things back to England?

12 A. That's right.

13 Q. And again, you are not prepared to say
14 as a matter of expert opinion that it was wrong
15 to suggest the possibility of sending those back
16 to England, are you?

17 A. No. Not on my present knowledge.

18 Q. I want you to assume with me, Father,
19 for a moment, that in fact the documents that are
20 referred to in this January 17, 1985 memo by
21 Mr. Wells were never sent back to England, and I
22 want you to assume that they were carefully
23 preserved by Brown & Williamson Tobacco Company.
24 I want you to assume that they were preserved
25 under a special categorization that said don't

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1 ever destroy these documents, and I want you to
2 assume that they were produced in litigation at
3 the first time that they were legitimately called
4 for. If all those facts are true, then there is
5 nothing wrong --

6 A. They are assumptions. Not facts.

7 Q. I'm saying if all these assumptions are
8 true, then there was nothing wrong with
9 Mr. Wells' proposal or conduct here, was there?

10 A. Well, they are big assumptions. I
11 acquiesce and say yes only on the fact that these
12 assumptions which are implausible are facts.

13 Q. Which of my assumptions is implausible?

14 A. Give them to me again.

15 Q. Number one, that these documents that
16 Mr. Wells suggested be pulled out as deadwood
17 were never sent back to England. That's not an

18 implausible assumption.
19 A. Go on. Number two.
20 Q. Number two, that they were carefully
21 preserved by Brown & Williamson company and were
22 produced when called for in litigation?
23 A. Well, on the second one, I suppose that
24 they were. Assuming all of those things, I can't
25 prove anything unethical from these three pages.

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1 Q. Father, with respect to the Council For
2 Tobacco Research, you have heard that term?

3 A. Yes.

4 Q. Are you familiar with generally
5 speaking what the Council for Tobacco Research
6 is?

7 A. Yes. I know the whole history.

8 Q. And you read a document I think that
9 was supplied to you titled The History of the
10 Council for Tobacco Research?

11 A. I did.

12 Q. And you have been furnished in addition
13 to that one summary quite a lot of information
14 about the Council for Tobacco Research?

15 A. I have.

16 Q. And you understand, don't you, that the
17 Council For Tobacco Research, or more
18 specifically its predecessor organization, was
19 formed back in 1954 by the tobacco industry as a
20 result of the firestorm of national and
21 international publicity concerning alleged links
22 between smoking and cancer?

23 A. Yes.

24 Q. Articles, independent scientific
25 articles had been published and widely publicized

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1 in the popular press during the year 1953,
2 correct?

3 A. Yes.

4 Q. And as a result of that and in response
5 to that in January of 1954, the tobacco industry
6 issued what was known as the Frank Statement?

7 A. I know it well.

8 Q. And they publicized that in newspapers
9 around the country?

10 A. Yes.

11 Q. And one of the things that the Frank
12 Statement did was to announce the formation of
13 this joint industry cooperative research group
14 that eventually came to be called Council for
15 Tobacco Research, correct?

16 A. Yes.

17 Q. Father, let me show you a copy of the
18 Frank Statement. Let's mark this as the next
19 exhibit.

20 (Drinan Exhibit No. 9 was
21 marked for identification.)

22 BY MR. McCORMICK:

23 Q. Showing you what's been marked as
24 Drinan Exhibit 9, this is, am I correct, a
25 document known as the Frank Statement?

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1 A. Yes.

2 Q. You are familiar with that in your

3 work?

4 A. Yes. I am.

5 Q. I'd like to ask you some questions
6 about the statements that are made in this
7 document. In connection with its description of
8 the industry research, Tobacco Industry Research
9 Committee as it was called, the document states
10 in this public press release that was issued,
11 press statement, advertisement, whatever you want
12 to call it, in paragraph numbered 3, that: In
13 charge of the research activities of the
14 committee will be a scientist of unimpeachable
15 integrity and national reputation.

16 A. Yes.

17 Q. Correct?

18 A. Yes.

19 Q. And you know from your work in this
20 case that in fact the first scientific director,
21 and all of the scientific directors of the
22 Tobacco Industry Research Committee and the CTR
23 as it was later called have in fact been people
24 of high integrity and national reputation, correct?

25 A. I'm not that familiar with their

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1 scientific credentials but I'm not in a position
2 to refute what you just said.

3 Q. Indeed the first person who served in
4 this capacity was Clarence Cook Little. Do you
5 remember that name?

6 A. I know the name.

7 Q. Clarence Cook Little had been the
8 president of the University of Michigan and the
9 president of the American Cancer Society,
10 correct?

11 A. Yes.

12 Q. And you would have no basis, Father, I
13 take it, for challenging either the integrity or
14 the national reputation of Clarence Cook Little?

15 A. Apparently not.

16 Q. Now, it also says that if you'll look
17 at the next sentence under 3, it also says that:
18 In addition there will be an advisory board of
19 scientists disinterested in the cigarette
20 psychiatry. Do you see that?

21 A. I do.

22 Q. And in fact, immediately following this
23 Frank Statement to smokers, the tobacco industry,
24 under the auspices of this Tobacco Industry
25 Research Committee, did found something known as

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1 the Scientific Advisory Board?

2 A. Yes.

3 Q. On which independent scientists, not
4 scientists in any way employed by the tobacco
5 industry have served, and their successors
6 continue to serve today as the Scientific
7 Advisory Board of this organization, correct?

8 A. That's right.

9 Q. And you have no basis, do you, Father,
10 for challenging the integrity, the scientific
11 integrity or the integrity of any of those
12 scientists who served on the board?

13 A. I'm here as an expert on legal ethics

14 and not in a position to comment on the integrity
15 of these people.

16 Q. The Frank Statement also pledges
17 assistance to the research effort in connection
18 with issues of smoking and health. That's what
19 this committee was, one of the things that it was
20 supposed to do?

21 A. Correct. Yes.

22 Q. And you have done an investigation and
23 learned a little bit about the history of the
24 subsequent years and the research that was funded
25 by this organization?

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1 A. Correct. Yes.

2 Q. And you know that in fact over its
3 history since this Frank Statement in 1954, that
4 the CTR as it came to be called has funded, has
5 provided financing for over 1,000 independent
6 scientists at institutions, medical schools, and
7 universities and laboratories all over the world,
8 correct?

9 A. Yes.

10 Q. Many of those scientists have also been
11 funded by other organizations, including the
12 American Cancer Society, in connection with their
13 work, correct?

14 A. Yes.

15 Q. In fact, there have been over 300
16 institutions, including Harvard, including Boston
17 University, and including dozens, hundreds of
18 other notable institutions who did work on this
19 subject funded by CTR?

20 A. That's right.

21 Q. Are you aware, Father, that the CTR
22 grantees, the people who the CTR granted funds to
23 do independent research on smoking and health
24 include three people who were at the time or were
25 later to become Nobel Prize winners?

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1 A. I know they are, sir. But this is not
2 in my area of expertise at all.

3 Q. We are going to talk about some areas
4 that are referred to in your disclosure. I just
5 want to be sure that we understand each other.

6 A. Yes.

7 Q. You understand that the scientists who
8 were given this money were free to publish their
9 works regardless of what the outcome of that work
10 was?

11 A. Yes.

12 Q. And they did so?

13 A. Yes.

14 Q. And many of the reports that were paid
15 for by the tobacco industry through the CTR, many
16 of those scientific studies resulted in
17 conclusions that found that there were
18 associations and were cited against tobacco as a
19 cause of disease?

20 A. Yes.

21 Q. In fact, you are aware, Father, are you
22 not, that there are over 300 studies that have
23 been cited by the Surgeon General in his tobacco
24 reports over the years that were funded by the

1 A. Yes.

2 Q. And there is no question on the record
3 that you have reviewed that there was any
4 scientist who received the money through this
5 organization who is not completely free to
6 express his opinions and to publish those
7 opinions if he wished?

8 A. I'm not in a position to say yes to
9 that.

10 Q. And you are not in a position to say
11 no?

12 A. No.

13 MR. KLUGMAN: I don't know if it
14 matters. The record is going to be very unclear
15 on that one.

16 MR. McCORMICK: I appreciate that
17 suggestion.

18 BY MR. McCORMICK:

19 Q. Am I correct that based on the
20 investigation that you have done that you don't
21 have any facts or information that any scientist
22 who received these grants from the CTR was
23 prevented in any way from publishing his opinions
24 and his research if he or she wished to do so?

25 A. I'm not in a position to say yes or no
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1 to that.

2 Q. Actually, I think maybe you are. My
3 question was do you know of any situations in
4 which a scientist that was funded by CTR was in
5 any way prevented from publishing his or her
6 work?

7 A. That's not in my area of competence,
8 but the answer is no.

9 Q. Father, you understand that CTR was an
10 organization that was formed by a whole group of
11 different companies, including tobacco
12 manufacturers, tobacco growers associations, and
13 other people that were interested in the tobacco
14 industry?

15 A. Yes.

16 Q. And included in that group of sponsors
17 were people who were competitors with each other,
18 correct?

19 A. Yes.

20 Q. That is, tobacco manufacturers?

21 A. That's right.

22 Q. Who were in commerce, in competition
23 with each other?

24 A. Yes.

25 Q. And when companies who were competitors
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1 with each other get together to form
2 associations, they have to be careful that they
3 don't run afoul of the antitrust laws?

4 A. Yes.

5 Q. And did you know that at the time that
6 this was published the tobacco industry didn't
7 even have a trade association?

8 A. No.

9 Q. Well, in any event, when CTR was

10 founded back in 1954, because it was an
11 organization that included companies who were in
12 commerce and competition with each other, it was
13 necessary for them to be very careful they didn't
14 violate the antitrust laws, correct?

15 A. Yes.

16 Q. And are you aware of some of the steps
17 they took to make sure that they didn't?

18 A. They probably consulted with lawyers.
19 They may even have gone to the Federal Government
20 to get an opinion.

21 Q. Both of those things would have been
22 appropriate to do?

23 A. Yes.

24 Q. In fact, there were lawyers, and you
25 would expect that there would be lawyers who

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1 would be very carefully consulted in connection
2 with the formation of such a committee?

3 A. Yes.

4 Q. Are you aware that before they had the
5 meeting at which they decided on forming this
6 committee, that they sent a letter to the
7 Department of Justice, Deputy Attorney General in
8 charge of the Department of Justice informing him
9 of this meeting and inviting him to attend if he
10 wished?

11 A. Yes.

12 Q. And that after the organization was
13 formed, a complete discussion and disclosure
14 about the formation and the purposes of this was
15 also provided to the antitrust division?

16 A. Yes.

17 Q. That wouldn't surprise you, would it?

18 A. Good lawyering.

19 Q. Father, similarly, like any other
20 association where you have got people who are
21 competitors with each other involved, as this
22 association went on over the years and did its
23 business, it would have been important for them
24 to continue to consult with lawyers about their
25 activities to make sure there were no violations

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1 of the antitrust laws?

2 A. Yes.

3 Q. I gather, Father, that you are also
4 aware that in addition to providing what they
5 call grants-in-aid -- and by grants-in-aid, I
6 mean no strings attached -- funding to
7 independent scientists to do research, that the
8 Council for Tobacco Research, as it was called,
9 also performed other functions for the tobacco
10 industry?

11 A. Yes.

12 Q. One of the things, just as an example,
13 is that it had independent of these scientists
14 who were doing the work, on the staff of CTR,
15 they had people who would do searches of the
16 world scientific literature to pull together in
17 one convenient place as much of the scientific
18 work on smoking and health as was available?

19 A. Yes.

20 Q. And there is nothing wrong with doing

21 that?

22 A. No.

23 Q. In fact, these companies have an
24 obligation to be aware of what the science was
25 concerning their product?

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1 A. Exactly.

2 Q. And if instead of having all 15 or
3 however many there are of these sponsors have a
4 staff of people, scientists who go out and review
5 and pull together all the studies from all over
6 the world, if they wanted to have this
7 association CTR do that in one spot and have them
8 all funded and then have them all have access to
9 it, there is nothing wrong with that, is there?

10 A. No.

11 Q. In fact, it sounds like a good idea,
12 doesn't it?

13 A. Does sound so.

14 Q. The other thing as you may know, that
15 the CTR does, did and does for the industry is to
16 arrange for and fund something known as CTR
17 Special Projects, is that correct?

18 A. I know that. Yes.

19 Q. And the way that CTR Special Projects
20 develop, do you understand that this program and
21 this funding is separate from the independent
22 scientist grant and aid program?

23 A. Yes.

24 MR. KLUGMAN: Can I just correct you,
25 Mr. McCormick. I think the record is clear from

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1 other proceedings that you were more accurate
2 when you used the past tense with respect to
3 Special Project. I don't know that it matters.
4 There haven't been any for a number of years.

5 MR. McCORMICK: I appreciate that
6 clarification. Let me amend that so that the
7 record is clear. I apologize for asking this
8 again. In light of this, I should.

9 THE WITNESS: Go ahead.

10 BY MR. McCORMICK:

11 Q. You are aware that for a period of time
12 although not at the current time, that the
13 Council for Tobacco Research funded CTR Special
14 Projects?

15 A. I'm aware.

16 Q. The way that the CTR Projects were
17 developed is that sometimes a lawyer who was
18 defending a case for a tobacco company would
19 think of a research project that that lawyer
20 wanted to have a consulting expert help him or
21 her with, correct?

22 A. Yes.

23 Q. And we have talked about the use of
24 those consulting experts?

25 A. Yes.

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1 Q. And there is nothing wrong with that?

2 A. No.

3 Q. And if the lawyer thought that this
4 project was such a great idea that maybe instead
5 of having his client pay for it maybe the whole

6 industry might chip into it, then you understand
7 he could go to the Council For Tobacco Research
8 and tell him his proposal and if the scientific
9 director agreed, then the whole industry would
10 chip into that?

11 A. I agree.

12 Q. And there is nothing wrong with that?

13 A. Getting close. Monopoly.

14 Q. Antitrust problem?

15 A. Yes.

16 Q. Let's put the antitrust issue aside.
17 As you recognized before and I'm sure is no
18 surprise to you, all of these things were being
19 carefully reviewed by lawyers.

20 A. Yes.

21 Q. There is nothing ethically wrong with
22 having these different companies fund a study
23 like that?

24 A. Except that in the same document it
25 says: There is no proof that cigarette smoking

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1 is one of the causes. We believe the products we
2 make are not injurious to health.

3 And then they go on and they say: We
4 have always and will be cooperating closely with
5 those whose safety is in the public health.

6 Are they still sticking to their two
7 major premises? That "our products are not
8 injurious to health"?

9 Q. Well, we'll come back to the question
10 of whether they are still sticking --

11 A. They are inseparable. You can't ask me
12 to say it's a good thing to bring all these
13 scientists together when they simultaneously say
14 we want you to prove this. We hold on to the
15 same basic premises.

16 Q. My question now was simply the project
17 known -- or the activity known as Special
18 Projects, where consultants who lawyers might
19 hire to help them and assist them in litigation,
20 if it's worthwhile science. If it's good
21 science, the CTR director would recommend that
22 there be -- that the whole industry chip in on
23 that?

24 A. On the assumption that's good science,
25 I agree.

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1 Q. You know that even though these were
2 projects which a lawyer designed to assist him or
3 her in defending the company, and therefore could
4 have been suppressed under the rules of
5 discovery, that if this was done as a CTR Special
6 Project, in fact, those scientists, those
7 consultants were free to publish their work,
8 correct?

9 A. Yes.

10 Q. Under the Federal Rules of Civil
11 Procedure, and under other rules of civil
12 procedure, as we have seen before, if I hire a
13 consultant to help me in litigation and it's not
14 a testifying witness, it's a consulting witness,
15 then there are privileges that apply to that.
16 But in this case, in fact, they went ahead and

17 they published these studies, do you understand
18 that?

19 A. Yes.

20 Q. Some of these studies that they
21 published that had been funded at the request of
22 the lawyers by CTR as part of this separate
23 Special Project fund, some of those projects were
24 studies, scientific studies that have been cited
25 against the industry on the smoking and health

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1 connection, correct?

2 A. Yes.

3 Q. Let me start my question over. So you
4 are clear, you understand that the Council for
5 Tobacco Research is not claiming a privilege?
6 They are not claiming any privilege. They are
7 not trying to prevent or resist turning over
8 scientific studies, do you understand that? Has
9 that been clear to you from your work?

10 A. I assume. I can't say for every single
11 document that has been produced over all of these
12 years that there hasn't been resistance to
13 disclosure.

14 Q. As far as any documents as to which the
15 Council of Tobacco Research is today -- let me
16 start that over again. There has also been work
17 done -- let me start that over again.

18 You don't know of any scientific study
19 which the Council for Tobacco Research is
20 claiming should be kept from discovery because of
21 the attorney work product privilege, do you?

22 A. Not at this moment. But I have no
23 empirical data that that is so.

24 Q. Father, again, this is so basic, I'm
25 sorry I even have to bother you with it, but I

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1 do. If there is a study going on out there that
2 has something to do with the question of smoking
3 and health -- will you assume that with me for a
4 minute?

5 A. Yes.

6 Q. Assume that it's being done by an
7 independent scientific organization that has
8 nothing to do with the tobacco industry, all
9 right?

10 A. Yes.

11 Q. And I'm following that as a lawyer for
12 the company --

13 A. Yes.

14 Q. -- in defending my client. If I write
15 to my client with an exchange of information back
16 and forth, letters back and forth, in which I'm
17 trying to learn about the significance of that
18 independent study and they are trying to get
19 advice from me on what the significance and
20 consequences of that study are, that kind of
21 communication is privileged, attorney-client
22 communications, correct?

23 A. I'm not certain. Why are they hiring a
24 client -- I mean hiring an attorney? The
25 attorney is working for the corporation. Are

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1 they coming -- why are they coming to the

2 attorney? Why is he writing to them?

3 Q. Father, you understand that when
4 scientific work is done and is published, that
5 can have tremendous legal implications for an
6 industry?

7 A. Yes.

8 Q. That all the lawsuits that began
9 against the tobacco industry began because of the
10 publication of Dr. Winder's mouth skin studies
11 back in 1953?

12 A. Yes. I know.

13 Q. When independent science is published
14 to the scientific world and published in the open
15 press, that can have serious legal implications
16 for a company, can't it?

17 A. I agree.

18 Q. There would be nothing wrong with a
19 company going to its lawyers and saying, This
20 work is going on, this study is being done, here
21 is a preliminary report, a final report will be
22 out, what are going to be the legal implications
23 for our product?

24 A. Except they have already made a pledge,
25 that we are pledging aid and assistance in the

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1 research effort about tobacco and tobacco use and
2 health. Well, the lawyers should be saying that
3 if this is good science, that we want this,
4 pursuant to our pledge, to come out.

5 Q. And -- Father, you are getting ahead of
6 me. I haven't asked you what the advice would
7 be. I want to just ask you now, wouldn't it make
8 perfect sense -- because research reports that
9 are issued have important legal implications,
10 wouldn't it make perfect sense for a company to
11 consult with its lawyers about that kind of
12 research?

13 A. Perfect sense, but somewhat deceptive.
14 They want to prove their basic premise that there
15 is nothing wrong with cigarette smoking. Why are
16 the companies saying to their lawyers, We have
17 financed this independent research, but we want
18 you to make sure that it's not disadvantageous to
19 us? That's what they are saying.

20 Q. Where are they saying that, Father?

21 A. Just by the fact that the lawyer
22 consults. The lawyer, as you have been saying,
23 knows that this might have adverse consequences
24 on a business, therefore he is anticipating this.

25 Q. Father, in my hypothetical question,

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1 the lawyer can't control what the scientist
2 concludes, can he?

3 A. Why is he in touch with him at all?

4 Q. I'm not saying he is in touch with the
5 scientist. He is in touch with the company.

6 A. The company and their lawyers are
7 consulting saying Dr. Smith in a month or so may
8 put out something very adverse to cigarettes, and
9 therefore, we have to huddle. Should they be in
10 touch with Dr. Smith?

11 Q. No. That's not my question.

12 A. Well, your question suggested that they

13 say to the lawyer, You talk to these scientists.
14 Q. Fine. I didn't want to imply that and
15 I really didn't -- I don't think I asked you
16 that. Let me start over again. Dr. Smith at
17 Harvard is doing a study, correct?

18 A. Yes.

19 Q. You need to answer verbally, Father.

20 A. Yes.

21 Q. Let me start over. Dr. Smith at
22 Harvard is a scientist who is doing a study,
23 okay?

24 A. Yes.

25 Q. And in connection with that study,

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1 there has been preliminary information released
2 about it. That study, like in any industry about
3 the product that's being sold, in this case
4 cigarettes, could have important legal
5 implications?

6 A. Yes.

7 Q. And if the industry was aware through
8 public means that the doctor at Harvard was doing
9 this study, it would be perfectly appropriate for
10 the industry to consult with its lawyers to seek
11 advice on what those legal implications would be?

12 A. Yes.

13 Q. And those communications, not involving
14 the doctor at Harvard, but just the attorney and
15 the client, those communications, oral
16 communications, and those written communications
17 would be privileged attorney-client
18 communications?

19 A. Unless they violate the fraud and
20 criminal --

21 Q. Unless they fell within the crime/fraud
22 exception?

23 A. Exactly.

24 Q. Father, would you take a look at the
25 disclosure statement issued by the State of Texas

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1 in connection with your testimony, which is
2 Exhibit 1 to your deposition.

3 A. I have it, yes.

4 Q. Would you look on page 1 at the second
5 last paragraph where it says -- I'm sorry. If
6 you look at the top of page 2, the first full
7 paragraph where it says: Father Drinan will
8 testify about how the attorneys for the tobacco
9 industry knowingly raised doubt about reported
10 health implications associated with smoking and
11 withheld, interfered, suppressed, or manufactured
12 scientific information. Do you see that?

13 A. I do.

14 Q. Father, as I have with other statements
15 here in your disclosure, I'd like to ask you to
16 tell me, if you would, each instance in which an
17 attorney did any of the things in those
18 sentence -- in that sentence.

19 A. I'm sure you are familiar with the book
20 The Cigarette Papers and there is a chapter about
21 this. I don't know whether this is admissible,
22 but there's legal concerns facing the industry
23 and that there's many, many instances here where

24 the lawyers were involved in doing what is
25 suggested here.

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1 Q. Father, somebody wrote that book,
2 right?

3 A. Several people.

4 Q. It's a published book that you've got
5 there?

6 A. Yes.

7 Q. And what you just referred to is an
8 article that somebody, we don't know who -- we
9 could tell I guess by looking at the book, but
10 that somebody has written in which that person
11 has made up certain reputations and expressed
12 certain opinions?

13 A. That's right.

14 Q. That person -- again, Father, if the
15 State of Texas wanted to ask that person to come
16 and testify in a court of law under oath as an
17 expert, I suppose they could have asked them,
18 couldn't they?

19 A. Yes.

20 Q. But they didn't ask him. They asked
21 you, correct?

22 A. That's right.

23 Q. So I'm not interested in what some
24 unnamed, unknown author from some secondary
25 source says about the subject. I'm interested in

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1 what you, as an expert, to a reasonable degree of
2 certainty, have concluded about each instance
3 where a lawyer has raised doubt, withheld,
4 interfered, suppressed or manufactured scientific
5 information?

6 A. I think the record is replete for
7 instances like that. Do you want me to start
8 with the long -- do you want more specific or do
9 you want me to give you an affidavit by Tuesday?
10 Do you want me to just go on and talk?

11 Q. Here's what I want. I don't want you
12 to just tell me what you have read in a secondary
13 source. I don't want you to just sit here and
14 read that article. I can read the article.

15 A. Okay.

16 Q. What I want you to tell me, what I'm
17 entitled to know and I think what you are
18 obligated to tell me is that if you, as you sit
19 here, know of any specific instance in which a
20 tobacco industry lawyer has withheld scientific
21 information wrongly, interfered, suppressed, or
22 manufactured scientific information wrongly?

23 A. I should have held this in my office
24 where all the documents are.

25 MR. KLUGMAN: Again, I would just note

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1 for the record that Father Drinan is reviewing
2 some papers that he has brought with him.

3 THE WITNESS: Which is quite
4 appropriate.

5 MR. KLUGMAN: I didn't say it was
6 inappropriate. When you start talking, we'll
7 know what the source of that information is.

8 BY MR. McCORMICK:

9 Q. Can you answer the question, Father?

10 A. I'm looking for specifics as to where
11 lawyers did precisely these things.

12 Q. You are reviewing your documents here
13 to try to do that?

14 A. Yes, I am. I would think that the
15 record through all of history suggests that
16 lawyers have been engaged in this business for
17 some time. They have been in touch with the
18 scientists, which might be inappropriate in the
19 first place, and that they have not made that
20 available to us.

21 And more importantly, it is lawyers all
22 through the three decades, or four decades, that
23 have suggested to the tobacco companies that: We
24 will withhold this information. We will conceal
25 it. We won't tell it to the Surgeon General. We

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1 won't let the people in the Congress know. We
2 will deliberately say that we think that
3 cigarette smoking is not addictive and that the
4 people go and testify with the aid and comfort of
5 all the lawyers. We think that the Surgeon
6 General is wrong. And they don't allow anything
7 to mislead them on that.

8 Are they withholding information? They
9 clearly are. Under the rules a lawyer should say
10 to his client that these are things that you
11 can't do. Everybody knows that this is dangerous
12 for your health. The whole public health
13 community says that.

14 We the attorneys are saying to the
15 principals of the major tobacco companies that
16 there is no need for you to tell the truth. You
17 may withhold the truth, even though people are
18 getting hurt and it is the lawyers primarily who
19 are doing that for their principals.

20 Q. Are you finished with your answer,
21 Father?

22 A. Well, I don't know.

23 Q. Let me come back and see if I can get
24 to you address my question. My question was,
25 based on your investigation and as an expert

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1 witness to a reasonable degree of certainty, can
2 you point to, as you sit here, and having had an
3 opportunity, as the record will reflect you did,
4 to look at the materials you have brought with
5 you, any specific instance in which a lawyer has
6 wrongfully withheld research, interfered with it,
7 suppressed it, manufactured it? Any specific
8 instance, Father.

9 A. Documents that I have here show that
10 Liggett's lawyers censored communications to
11 doctors because such a communication could knock
12 the prop from under us in future litigation.
13 This is from a statement on the man who filed the
14 Tobacco Accountability Act. You know him well,
15 Henry Waxman. Some of the documents are here.
16 They are all in the congressional hearings, some
17 of which I have read.

18 This summarizes here what some of the
19 lawyers have done. And there is a bill here, the

20 Tobacco Accountability Act, which would have no
21 regulatory authority over tobacco companies but
22 it would have some powers, and other
23 investigative powers, so that here is someone who
24 knows -- who says that the tobacco companies have
25 failed to disclose the internal attorney-client

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1 documents that contain evidence of the criminal
2 or fraudulent conduct by the companies.

3 We don't know all of this but that from
4 the Liggett documents we are beginning to learn
5 how the lawyers told their principals that this
6 is dangerous stuff and that we should be doing
7 something with.

8 According to the lawyers, Liggett's new
9 cigarettes achieved an approximate 80 percent of
10 noncancerous tumors and lawyers are present in
11 the last 20 or 30 years and that they have helped
12 to conceal the relevant information.

13 Q. You are relying on Henry Waxman's
14 opinions?

15 A. No. I think I'm relying on facts.

16 Q. That's what I'm really interested in,
17 Father, is the facts. What instance, factual
18 instance, can you say under oath here today to a
19 reasonable degree of certainty involved a lawyer
20 suppressing or interfering with or manufacturing
21 scientific information?

22 A. I'm not certain it's who manufactured
23 it. He is dealing principally with the
24 presidents of the company, and that they have
25 been regularly, secretly telling the principles,

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1 telling their presidents, that you don't have to
2 admit that you were dead wrong when you put up
3 the Frank Statement. You don't have to reverse
4 your opinion. That's concealing information that
5 is essential, and that is an essential definition
6 of what I say here in the prospectus. That they
7 withheld interfered or manufactured scientific
8 evidence. Here was the essence of the case.

9 Q. But you are not saying that he
10 manufactured any evidence?

11 A. They concealed more than -- they
12 withheld or suppressed or retained the
13 information.

14 MR. KLOK: It might be a good time to
15 take a break.

16 THE WITNESS: I don't have an instance
17 right now where they manufactured evidence but
18 they certainly made it impossible for the
19 community to find out, and that they are part of
20 the conspiracy, if you will, by which confusion
21 was caused in the scientific community, where
22 ambiguity was put out there when there was no
23 ambiguity, and why millions of people didn't come
24 to the truth. And they said to their principals,
25 don't say that it is addicting, although we know

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1 that it is. And that's one of the major reasons
2 why 1,000 people were buried this morning because
3 they smoked. And every morning.

4 BY MR. McCORMICK:

5 Q. Father, in terms of specific facts or
6 specific instances, we now agree, I think, that
7 you have no knowledge of any specific instance in
8 which a lawyer manufactured scientific
9 information, correct?

10 A. What do we mean by manufacture?

11 Q. I didn't write this disclosure, Father.

12 A. Let me go back and think on my notes.
13 That's there because that was my impression, that
14 they manufactured -- manufactured nonscientific
15 information. Yes.

16 MR. CLARKSON: Let me say before we
17 take our break that I hope there is not a
18 misunderstanding here. Father Drinan is not a
19 witness because he was a fly on the wall when
20 these conversations took place or these documents
21 were dictated to a secretary. He is testifying
22 whether or not these various activities, which
23 are alleged in the smoking paper, or the Waxman
24 documents, he is saying if these events occurred
25 as they are related that they were violations of

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1 the ethics rules.

2 MR. McCORMICK: Counsel, this is
3 inappropriate. We can communicate out of
4 Father's presence. You can write me a letter if
5 you need to clarify his retention. This is
6 inappropriate. I'd ask you not in Father
7 Drinan's presence to discuss this. If you want
8 to talk to me about it or make some further
9 disclosure, then I believe we should do that off
10 the record.

11 MR. KLOK: It might be a good time to
12 take a break.

13 MR. McCORMICK: I don't think it is,
14 Counsel, I'd like to get an answer to my
15 question.

16 BY MR. McCORMICK:

17 Q. I don't care where you got the
18 information right now. I just want to know of
19 any specific circumstance that you know of, as
20 you sit here, Father, of any of these actions:
21 Withholding, interfering, suppressing, or
22 manufacturing scientific information, a specific
23 instance, where that was done by a lawyer for the
24 tobacco industry. If you don't have any in mind,
25 you can tell me that. If you do, I'm entitled to

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1 ask you specific questions about it.

2 A. I don't have a name. I'm not going to
3 indict a law firm. I know a lot of lawyers who
4 would do this. I know that lawyers like Arnold &
5 Porter tell people when they are coming in to be
6 an associate, you are not required to do our
7 tobacco business if you have an objection.

8 I know the assets that law firms get
9 from representing tobacco. This is what my
10 feeling is that -- and they are representing
11 people who are refusing to say the truth and
12 telling falsehoods. My clear inference is that
13 they have to be checking with their lawyers, and
14 their lawyers, either by acquiescence or silence,
15 are allowing these things to happen.

16 MR. McCORMICK: I move to strike the
17 answer as nonresponsive.

18 BY MR. McCORMICK:

19 Q. I understand that's your feeling and
20 that's your whatever. But my question is, in
21 what specific instance can you identify, as you
22 sit here today, has a lawyer withheld,
23 interfered, suppressed, or manufactured
24 scientific information. Give me a specific --
25 can you give me a specific example, yes or no?

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1 A. I thought I have given you specific
2 answers about law firms and all types of
3 activities that they do. Am I supposed to be
4 there when Mr. Jones says to the principal, Don't
5 say this and don't say that it's addictive, when
6 they are going and negotiating with the Surgeon
7 General about the actual title, the actual
8 warning?

9 That's what I meant. Attorneys for the
10 tobacco industry raised doubt about the health
11 implications, and that where they are telling
12 people -- they are telling all of their
13 principals that, We can conceal all of this
14 information. So I think that the case has been
15 made that the industry and their lawyers have in
16 fact concealed information which has caused doubt
17 among all of the public and that that's the
18 contribution if you will, or the role of the
19 lawyer in this controversy.

20 Q. But you agree, as I believe you have
21 testified a minute or so ago, you can't and won't
22 name any individual or indict any individual
23 lawyer or any individual law firm for the tobacco
24 company for having withheld or interfered or
25 suppressed scientific information?

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1 A. No. Mr. McCormick. That's not my role
2 here. I'm here as the legal expert. I set forth
3 the moral principles. It's up to other people to
4 adjudicate that Mr. X did this or this law firm.
5 I think that the question isn't appropriate. I'm
6 not supposed to be here during this. That's not
7 my role at all. You put me in the situation
8 where I'm supposed to have a specific name.
9 That's not in the cards at all. I'm not required
10 to prove this by lawyer A, B, and C, and that
11 this is true. And that the documents, the whole
12 conversation today explains why this is so.

13 Q. I'm not trying to put you in that role,
14 Father. I apologize if I suggested that I was.
15 The fact is that, if I understand then, and let
16 me see if we are clear on this, that it is not
17 your intention either today or in the future to
18 point to a specific lawyer or a specific law firm
19 and say that incident constituted an
20 impermissible withholding or manufacturing or
21 suppression of scientific information?

22 A. No. People have not come to me and
23 asked me to do that. In no definition of an
24 expert witness is that required of the person,
25 that I'm supposed to prove the actual document

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1 that, or the actual case. This is not a trial
2 for individual attorneys or one attorney. This
3 is a trial, if you will, brought by 40 attorneys
4 general as to the whole liability of this
5 particular industry, and their lawyers are there
6 and all I can say is that the lawyers have
7 collaborated, they have conspired, but it is not
8 my role to say that A, B, or C, these lawyers
9 have done this.

10 Q. You can't do that today and you are not
11 going to attempt to do that?

12 A. It's not my understanding of the role
13 of a legal expert.

14 Q. If somebody came to you and said, look,
15 you have reviewed thousands of documents,
16 correct, Father?

17 A. That's right.

18 Q. And you have reviewed deposition
19 testimony?

20 A. Yes.

21 Q. And you have reviewed affidavits,
22 correct?

23 A. Yes.

24 Q. And you can't sit in judgment, from the
25 work that you have done so far and the

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1 information you have been provided, and point to
2 a specific instance and say well, I know enough
3 about all the facts and I know enough about all
4 the context and I know enough about all the state
5 of mind of that lawyer to say that that lawyer
6 did anything wrong?

7 A. That's not my role in this litigation.

8 Q. All right.

9 A. That's not the role of the other
10 experts. The MD is not supposed to ask about
11 actual cases of cancer, did this come from
12 smoking.

13 Q. Father, you have been provided these
14 various documents?

15 A. Yes.

16 Q. Even though you cannot, as an expert,
17 to a reasonable degree of certainty, pass
18 judgment on the various different events in this
19 case, is that correct?

20 A. Yes, sir.

21 Q. Even though you can't pass judgment to
22 a reasonable degree of certainty that these
23 lawyers whose work you have reviewed was wrong,
24 do you have any incidents that stick in your
25 mind? I understand, none of us have perfect

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1 recall. But are there any incidents you even
2 remember where a specific lawyer is accused of
3 having interfered with or suppressed or
4 manufactured information?

5 A. There is one case. I can't document
6 this, but an acquaintance years ago was a lawyer
7 in a rather small firm here in D.C. and he said
8 to them in June that unless you drop the tobacco
9 account by December, I'm leaving the firm. It
10 would be with a bit of splash of publicity. They
11 dropped the tobacco company. He was in a

12 position to say that we are doing these things
13 for the tobacco industry and I'm not comfortable
14 with them at all.

15 Q. Did he tell you that he had destroyed
16 or suppressed any documents?

17 A. No.

18 Q. You don't believe that he did, do you,
19 Father?

20 A. No. But I think that his principals,
21 his associates were in the -- I wouldn't say they
22 did this, but they were involved in going along
23 with the tobacco industry and he felt very
24 uncomfortable and presumably he was able to
25 persuade them that this is unprofessional.

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1 Q. Father, he didn't tell you that anybody
2 else in his firm had destroyed any scientific
3 evidence or suppressed it, did he?

4 A. There is more things in that sentence.

5 Q. Did he -- who is this person?

6 A. I can't tell you. That's what I said.
7 I can't tell you.

8 Q. Why can't you tell me?

9 A. Because it's years ago and I can't
10 remember his name.

11 Q. So some lawyer years ago whose name you
12 don't remember told you that he insisted that his
13 firm not represent tobacco companies, correct?

14 A. That's right.

15 Q. He didn't tell you that he or anybody
16 in his firm had withheld or interfered with or
17 suppressed or manufactured any scientific
18 information, did he?

19 A. He withheld. They withheld evidence
20 and -- that they didn't tell people what they
21 knew about the terrible addictive quality of --

22 Q. What firm was this?

23 A. I don't know. This is very, very
24 episodic. It's a name. I don't remember.
25 That's years ago. He probably was a profile in

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1 courage and I think that this is, I hope common
2 in the legal profession where they are
3 uncomfortable with this.

4 Q. Father, you have named then in response
5 to my question an example of a lawyer in a law
6 firm whose name you cannot recall who 24 years
7 ago --

8 A. I didn't say 24 years.

9 Q. Some years back insisted that his firm
10 not represent tobacco companies. Do you have any
11 other factual knowledge, as you sit here, or
12 recollection of any time that layer has been
13 accused or any information that a lawyer has in
14 fact withheld or interfered or suppressed or
15 manufactured scientific information?

16 A. Withheld is the operative word there.
17 One of them. They withhold the information that
18 they know, that the tobacco industry is not
19 living up to its Frank Statement, that they are
20 seeking to mislead people and that they keep
21 insisting that this is not addictive and that
22 they feel very uncomfortable. That is

23 withholding information, suppressing information,
24 manufacturing information, pretending that this
25 allegation of the tobacco industry is all right.

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1 Q. But again, you are not going to
2 testify -- you can't testify today and you don't
3 have the facts to testify that that occurred as
4 to any specific instance or any specific lawyer?

5 A. I repeat that that is not my role as a
6 legal expert.

7 MR. McCORMICK: Do you want to take a
8 break at this point?

9 MR. KLOK: Yes.

10 (Recess.)

11 BY MR. McCORMICK:

12 Q. Back on the record. Let me come back
13 to just clean up one point, finish up one point
14 on a rule, a 26(b)(4) and that is the attorney's
15 right under the rules to engage consulting
16 experts to assist the attorney in
17 representations. We have talked about that
18 before?

19 A. Yes.

20 Q. We, I believe, have established an
21 agreement that under rule 26(b)(4)(a) and (b),
22 except under extraordinary circumstances, that
23 communications -- consulting the expert are
24 privileged. They cannot be obtained through the
25 discovery process?

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1 A. Yes.

2 Q. And it would be an ethical violation
3 if, for instance, you were engaged as a
4 consulting expert for a lawyer representing a
5 client, not a testifying expert, but a consulting
6 expert, it would be an ethical violation on my
7 part if I tried to go around the rules and go to
8 you privately and obtain your communications with
9 that lawyer, would it not?

10 A. Apparently according to the rules.
11 Yes.

12 Q. Now, Father, one of the other items
13 that was in the box of the materials that was
14 provided to you was the deposition of a
15 Mr. Wygand. Do you remember?

16 A. I think so.

17 Q. Does it come back to you?

18 A. Elaborate a bit.

19 Q. Do you remember the name Jeffrey Wygand
20 as a deposition that you were asked to read?

21 A. I do.

22 Q. Does anything come back to mind from
23 the wealth of things you have reviewed as to that
24 deposition that is important to your testimony in
25 this case?

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1 A. Just refresh my recollection. Again, a
2 bit, on Mr. Wygand.

3 Q. Again, Father, we could go through the
4 deposition and I want to ask you a couple of
5 questions about it specifically, but before we do
6 that, do you as you sit here have any independent
7 recollection of who he was?

8 A. I'm not certain. But tell me and then
9 it might trigger.

10 Q. Let me ask you this. If you don't, if
11 it's not something that's stuck in your mind,
12 then I don't want to spend a lot of time on it.
13 The materials that we were sent included a
14 deposition that this gentleman gave in which only
15 the plaintiff's questions had been asked. It was
16 a deposition that wasn't completed because the
17 plaintiff had asked its questions but the defense
18 had not been able to request questions.

19 A. It doesn't ring a bell.

20 Q. That's the one we received. Let me
21 just ask you if you received as part of your work
22 in this case a deposition that wasn't complete?
23 You only received the plaintiff's portion of it,
24 fairness would dictate that before you considered
25 anything from that deposition in your testimony,

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1 that you would see the entire deposition,
2 correct?

3 A. Yes.

4 Q. You also I believe were furnished the
5 deposition of a person by the name of
6 Henningfield. Does that name ring a bell?

7 A. Yes.

8 Q. Did you review that deposition?

9 A. I did.

10 Q. Do you rely on that deposition?

11 A. Well, that seemed to be particularly
12 meaningful to me. Yes.

13 Q. Are you relying on that deposition in
14 connection with your work here?

15 A. I would assume so.

16 Q. When you say you assume so, I mean, you
17 would know, wouldn't you?

18 A. Mr. McCormick, there is so many things
19 in my mind, where do I rely upon it.

20 Q. Again, this just isn't a memory test,
21 Father, but I am entitled to know what you do
22 remember.

23 A. I know.

24 Q. My question is, is there anything in
25 particular from the deposition of

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1 Mr. Henningfield that you recall that is relevant
2 to your investigation here?

3 A. I do. I seem to have taken a note that
4 that is important to me, but that if you tell me
5 just a bit about it, that will refresh my
6 recollection as to why that is important.

7 Q. Before I talk to you about the
8 deposition, as a threshold matter, I am entitled
9 to ask you, and I believe you are obligated to
10 tell me if there is anything as you sit here that
11 sticks in your mind that you recall from that
12 deposition?

13 A. I thought that it was persuasive and
14 informative. I checked it off on the original
15 document as something that I should review that's
16 valuable.

17 Q. And in terms of the substance of what
18 was said in the document?

19 A. I think so on the substance. It just
20 seemed like one of the more important documents
21 to me.

22 Q. I understand. But the question is, is
23 there anything from the questions and answers
24 specifically, of substance, that you can recall
25 as you sit here?

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1 A. No. But if you refresh my recollection
2 as to something there, then that might ring my
3 memory.

4 Q. I think we established earlier, Father,
5 that you did receive from the counsel for Texas a
6 copy of the State of Texas motion to compel
7 disclosure of allegedly privileged documents?

8 A. Yes.

9 Q. And I want to ask you about a couple of
10 additional issues or items. One of the items in
11 here, and I apologize that I don't have another
12 copy of this. You may have yours. But one of
13 the issues that you may recall is discussed in
14 here is an issue concerning a memorandum that was
15 written by a Mr. Thomas S. Osdene, O-s-d-e-n-e
16 concerning documents from an agency called
17 Inbifo, I-n-b-i-f-o, a Philip Morris facility.
18 Does that ring a bell?

19 A. Sort of. Yes.

20 Q. I think your testimony is clear from
21 our earlier discussions, but I just want to be
22 sure with respect to this specific incidence of
23 this document of Mr. Osdene, have you not on the
24 basis of this review, formed -- the review of
25 this document, formed any opinion that what

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1 Mr. Osdene did or proposed in this document was
2 improper, have you?

3 A. No.

4 Q. In order to do that, you would have to
5 know again all of the facts surrounding it?

6 A. Exactly.

7 MR. KLOK: Counsel, are you talking
8 about the set of documents that has already been
9 referred to that Dr. Drinan has not had an
10 opportunity to read yet?

11 MR. McCORMICK: No. That's the
12 supplemental memorandum. I'm referring to the
13 original memorandum.

14 BY MR. McCORMICK:

15 Q. You understood that, didn't you?

16 A. Yes.

17 MR. KLOK: I don't believe the original
18 memorandum is something that Father Drinan has
19 been given, at least in the list of disclosure
20 documents that we provided you.

21 MR. McCORMICK: The State of Texas
22 motion to compel disclosure of allegedly
23 privileged documents, Father Drinan has already
24 identified earlier in the deposition as a
25 document he reviewed, and it was a document that

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1 was included in the box of materials that was
2 furnished to us. It is also listed specifically
3 on --

4 MR. KLOK: Counsel, you can stop right
5 there. If it was indeed in the box of materials
6 we furnished you, then Father Drinan has reviewed
7 it.

8 MR. McCORMICK: It's also item number 1
9 in your letter to Mr. Stover of August 1997.

10 MR. KLOK: I apologize.

11 BY MR. McCORMICK:

12 Q. Father, one of the other incidents or
13 documents that's discussed in this plaintiff's
14 State of Texas motion to compel is a June 1979
15 memorandum which you were not furnished a copy
16 of, I don't believe, because it wasn't in the
17 box, but the memorandum is quoted here, in which
18 it's a quote from Mr. Wells, again, who we
19 discussed before, and this is the quote, it
20 says: Jim Rosene , R-o-s-e-n-e, has kept his
21 eyes out for potentially sensitive materials and
22 has simply held them in his office. For example,
23 the JANUS, J-A-N-U-S, material was never entered
24 into the library.

25 Do you recall by any chance reading

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1 that sentence?

2 A. Yes.

3 Q. Father, have you done any investigation
4 beyond just reading those words to determine what
5 the circumstances were here?

6 A. No.

7 Q. You don't know what came before and you
8 don't know what came after?

9 A. No. I'm not certain.

10 Q. You don't know who Mr. Rosene was?

11 A. What is the question? The answer is
12 no.

13 Q. You don't know what JANUS was?

14 A. I have some recollection of that as a
15 project. Yes.

16 Q. It was a scientific research project,
17 correct?

18 A. That's correct.

19 Q. And do you know, you know then, if you
20 have looked at that beyond this, which apparently
21 you have, if you know what JANUS was, you know,
22 don't you Father, that in fact the JANUS
23 material, along with other scientific research
24 that was called for, was in fact produced in
25 litigation by Brown & Williamson?

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1 A. I remember that.

2 Q. And indeed the JANUS material was
3 produced by Brown & Williamson in litigation and
4 has been the subject of scientific comment,
5 correct?

6 A. That's my recollection.

7 Q. I take it that based on reading this
8 sentence and the limited investigation that you
9 have been able to do, that you don't have any
10 opinion as an expert here that Mr. Rosene did
11 anything improper?

12 A. You are correct.

13 Q. Or Mr. Wells?

14 A. You are correct.

15 Q. Father, we have looked several times
16 today, two or three times, at documents that are
17 facially privileged, correct?

18 A. Yes.

19 Q. And I asked you about, did you wonder
20 when you got them how they had gotten into your
21 hands, and since you have read a lot of the
22 material that's been written on this subject, I'm
23 sure you are aware from the national press that
24 there was, that many of these documents that you
25 have been asked by these lawyers to review were
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1 documents that were stolen from the Brown &
2 Williamson company?

3 A. I know that.

4 Q. And you know from your work in this
5 case that these documents were smuggled out of a
6 law firm in Louisville, Kentucky by a paralegal,
7 correct?

8 A. Yes.

9 Q. Have you read the portion of the record
10 of this case in which it was proved by a
11 deposition of that paralegal that the way he
12 smuggled those documents out was to come to work
13 wearing a rubber girdle and to hide the documents
14 inside the girdle?

15 A. I don't recall that fact.

16 Q. In any event, you know that this
17 paralegal, Merrill Williams, stole these
18 documents from the Wyatt, Tarrant law firm?

19 A. Yes.

20 Q. And you know that when Merrill Williams
21 stole these documents that have now found their
22 way into your hands that he wasn't stealing them
23 to do some great public service, he was stealing
24 them to extort money from Brown & Williamson?

25 A. Yes.

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1 Q. What he did with them was to write a
2 letter through a lawyer to Brown & Williamson and
3 demand extortion money for the return of those
4 documents?

5 A. Correct.

6 Q. And then Brown & Williamson refused to
7 pay his extortion money?

8 A. Yes.

9 Q. And when they wouldn't pay for them, he
10 went to Mr. Ron Motley and Mr. Ron Motley did in
11 fact pay him for those documents, didn't he?

12 A. I'm not certain of the last fact. It
13 may be so if you say so.

14 Q. Father --

15 A. I have no reason to deny it.

16 Q. You have been given a lot of material
17 in this case?

18 A. Right.

19 Q. Do you understand that Mr. Merrill
20 Williams has testified under oath that in return
21 for these documents, that -- after he turned
22 these documents over to Mr. Motley when his
23 extortion plan failed, that Mr. Motley bought him
24 a house in Mississippi? Are you aware of that?

25 A. I have no reason to doubt what you are

1 saying.

2 Q. Bought him a boat, bought him a car, do
3 you understand all that? And put him on the
4 payroll?

5 A. I haven't heard all of these specifics,
6 but do I know the story? In general.

7 Q. Father, counsel points out something
8 and I do need to correct the record. The name of
9 the organization that bought all of these
10 different things for the -- let me withdraw
11 that. I misspoke when I said that these
12 documents were sold to Mr. Motley. Although I
13 believe that it's true, in fact, I cannot prove
14 it. I want to correct the record on that.

15 What I can prove and what Merrill
16 Williams has testified under oath, as counsel has
17 just pointed out, is that they were sold to
18 Mr. Richard Scruggs. Mr. Richard Scruggs, along
19 with Mr. Motley, was as you will recall one of
20 the lawyers for the State of Mississippi,
21 correct?

22 A. I know the name.

23 Q. If you know this story, what you know
24 is that after Merrill Williams' extortion plot
25 failed he went to Mr. Scruggs and Mr. Scruggs

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1 through a shell company provided benefits?

2 MR. CLARKSON: Counsel, this has not
3 been fully adjudicated yet. Are you asserting
4 these as facts or merely allegations?

5 MR. McCORMICK: I am asserting these as
6 sworn testimony of the culprits themselves.
7 That's what I'm asserting it as.

8 MR. CLARKSON: If that's the case then
9 this case we are in now could be handled with a
10 summary judgment.

11 BY MR. McCORMICK:

12 Q. Father?

13 A. Yes.

14 Q. It's not right to steal documents,
15 correct?

16 A. Correct.

17 Q. And it's not right to try to extort
18 money?

19 A. Right.

20 Q. And these were ethical and moral wrongs
21 by Merrill Williams, correct?

22 A. As you tell the story, it seems that
23 they are inappropriate at least.

24 Q. And it would be inappropriate -- and
25 certainly if a document was a privileged

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1 document, the fact that Merrill Williams smuggled
2 it out of the law firm inside of his clothes and
3 tried to blackmail the company into paying him
4 money and then turned it over to the lawyers,
5 that wouldn't deprive that document of its sacred
6 attorney-client privilege, would it?

7 A. The holder of the document has not
8 waived it.

9 Q. Right.

10 A. All right.

11 Q. Immediately after these documented were
12 turned over to Mr. Scruggs, they appeared at the
13 University of California San Francisco library,
14 correct?

15 A. Yes.

16 Q. Do you know how they got there?

17 A. I'm not certain.

18 Q. What is your belief?

19 A. I just don't know.

20 Q. And they were made then, immediately --
21 immediately taken by some people at the
22 University of San Francisco without the agreement
23 or without the consent of Brown & Williamson and
24 they were put on the Internet and made public?

25 A. I think it was the University of

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1 California, not University of San Francisco.

2 Q. University of California at San
3 Francisco?

4 A. Right.

5 Q. They shouldn't have done this, should
6 they, Father?

7 A. Counsel is leading the witness.

8 Q. Those documents, documents which are
9 stolen and which are facially privileged, should
10 not be used for any purpose in litigation without
11 a judicial determination that for some reason
12 that privilege has been waived or doesn't apply,
13 correct?

14 A. Well, that judicial determination is
15 being sought. If I'm not wrong.

16 Q. You are correct. But it hasn't been --

17 A. Determined.

18 Q. And until it is, it's not right to use
19 these documents, is it?

20 A. Well, that's up to the courts. I don't
21 think that's technically a problem of legal
22 ethics, which is my forte. That would be a
23 question of American law.

24 Q. Well, it would be a question of the
25 attorney-client privilege.

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1 A. And its statutory construction of the
2 particular jurisdiction.

3 Q. You are not an expert on that subject?

4 A. That's very complicated. Would it be
5 federal law or state law. I don't think there is
6 any decision law on that point.

7 Q. But my point was that on that subject,
8 you are not prepared to sit here and hold
9 yourself out as an expert?

10 A. I didn't think that that came into
11 this. This is more constitutional law than legal
12 ethics. Is it now in the public domain like the
13 Pentagon Papers, all of that would have to come
14 in on the First Amendment. I'm not prepared to
15 say that I am an expert in that area.

16 Q. One of the other documents or items in
17 the box of materials that was sent to us was a
18 videotape produced, I believe, by the Tobacco
19 Industry Research Committee, that had some
20 videotape of Clarence Cook Little and his
21 successor, correct?

22 A. I have not seen that videotape. It's
23 in my office and I have not gotten a VCR.
24 Q. Do you intend to do so?
25 A. I would think so.

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1 Q. What would be your purpose in reviewing
2 the videotape?
3 A. I don't know. It was given to me as
4 something relevant. I certainly haven't gotten
5 around to using it.
6 Q. Is there anything that you know about
7 that videotape that causes you to think that it
8 will be of some value to you?
9 A. It was supplied to me, and I assume
10 that it has some value. I don't know.
11 Q. But you don't know what that would be?
12 A. No.
13 Q. You have also referred to a copy of a
14 book known as The Cigarette Papers.
15 A. Yes.
16 Q. And The Cigarette Papers is, as we have
17 discussed earlier, a collection of different
18 articles relating to the controversy over smoking
19 and health and current litigation over smoking
20 and health?
21 A. Yes.
22 Q. You don't contend for a minute, do you,
23 Father, that the authors of those articles were
24 unbiased?
25 A. Unbiased. No.

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1 Q. They had a very definite bias?
2 A. There's very few of us who are
3 unbiased.
4 Q. The authors of those articles were not
5 unbiased observers, were they?
6 MR. CLARKSON: Are you saying before or
7 after their research?
8 MR. McCORMICK: Before or after their
9 research at any point in time.
10 THE WITNESS: Mr. McCormick, it spins
11 around the question, what do you mean, unbiased?
12 Everyone has their biases on this topic.
13 BY MR. McCORMICK:
14 Q. Are you relying for the purposes of
15 opinions on this case --
16 A. Only on whatever facts they might ---.
17 Q. Got to finish. Sorry. Let me start
18 over. Are you relying on the book, The Cigarette
19 Papers, for any purpose in giving your opinion
20 here?
21 A. Only on those facts that are clearly
22 able to be corroborated.
23 Q. You haven't corroborated any such facts
24 yet, I take it?
25 A. I wouldn't say that. They have a lot

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1 of material there that is found in other sources.
2 Q. In fact, a big part of that book is
3 just a rehash of the JAMA articles, correct?
4 A. To some extent.
5 Q. Some of The Cigarette Papers is lifted
6 from JAMA, JAMA came first, then Cigarette

7 Papers, or do you know?
8 A. I forget the sequence.
9 Q. Anyway, let me come back. The
10 Cigarette Papers, that book, you said you would
11 only rely on facts stated in that book which
12 could be independently corroborated?
13 A. Yes.
14 Q. You wouldn't accept a fact out of that
15 book and accept it for the truth without
16 independent corroboration, correct?
17 A. I think so. But there are some facts
18 there that are already in the public domain.
19 Q. I understand. But you wouldn't rely on
20 that secondary source just standing alone?
21 A. I can't say that as a sweeping
22 generalization. Every source is to be taken as
23 to whether this is plausible, credible.
24 Q. I realize cigarette papers is The
25 Cigarette Papers and I can read it as well as

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1 anybody can read it, but again, as you sit here,
2 is there anything that sticks specifically, any
3 specific facts in that book that stick in your
4 mind as something that would be important in
5 connection with your testimony?
6 A. Yes. I think that the material there
7 on the lawyers and what the lawyers did is
8 relevant to the role of an expert on legal ethics
9 in this matter.
10 Q. Let's not go all the way down this road
11 again as far as any specific incident or any
12 specific lawyers. There is nothing that you
13 recall as you sit here from that book that you
14 would cite in your testimony in this case, is
15 there, Father?
16 A. I'm not certain of the answer to that.
17 It's a big book.
18 Q. You reviewed the deposition in this
19 case or were furnished the deposition in this
20 case of one Bennett LeBow?
21 A. I think so.
22 Q. Do you remember who he is?
23 A. I think so.
24 Q. You tell me.
25 A. Sir, with all due respect, I have read

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1 thousands of pages in this period of time.
2 Q. Father, I mean no disrespect here in
3 asking you these questions, nor do I mean to
4 imply by my questions that you are necessarily
5 going to have to remember everything you have
6 read. Do you understand that?
7 A. I understand.
8 Q. All of us read things and we retain
9 some of it and we don't retain other stuff. The
10 more important things are the things we most tend
11 to remember, fair?
12 A. Yes.
13 Q. So right now, I'm just trying to
14 understand, what you remember and what you
15 don't. Do you remember anything specifically
16 about the Bennett LeBow deposition?
17 A. Not at this moment.

18 Q. Father, another document that you were
19 asked to review was a deposition that was given
20 by a Professor John Freeman who was the legal
21 expert retained by Mr. Motley and others in
22 connection with the Florida case, the Chiles
23 case. Do you remember that?
24 A. I read that. I thought it was very
25 helpful.

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1 Q. You don't have any disagreement, I take
2 it, with Professor Freeman's positions?
3 A. As I recall, I thought it persuasive.
4 Q. Again, as with you, as with the other
5 experts, Professor Freeman did an extensive
6 factual investigation as well, correct?
7 A. Am I correct that it was an affidavit,
8 not a deposition. It was a deposition?
9 MR. KLUGMAN: There was an affidavit.
10 I don't recall there being a deposition. There
11 certainly was an affidavit.
12 BY MR. McCORMICK:
13 Q. It's possible. My note says
14 deposition. Whether it was an affidavit or a
15 deposition that you read; either way, you don't
16 have any disagreement with what was said in
17 there, do you?
18 A. My recollection there is that I tended
19 to agree with all of it and I remember
20 specifically it's an affidavit because I said why
21 don't they ask me to write an affidavit like this
22 and put down all of the convictions. It's better
23 for me or easier for me to set these things
24 forth.
25 Q. You do understand why depositions are

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1 more valuable than affidavits, don't you, Father?
2 A. I'm trying to.
3 Q. You do understand that, don't you?
4 A. Yes.
5 Q. It's because I get a chance to ask you
6 questions rather than have you just --
7 A. I know.
8 Q. You mentioned several times the
9 testimony of Mr. Bible and Mr. Goldstone?
10 A. Yes.
11 Q. And there have been news accounts about
12 those, that deposition testimony, correct?
13 A. Yes.
14 Q. But have you read the depositions
15 themselves?
16 A. I have. I read Mr. Goldstone's. I
17 think that I may have it here. I did.
18 Q. Do you have it there?
19 A. I'm not sure. I marked it up. I read
20 it.
21 Q. You don't have it there?
22 A. I'm sorry. No.
23 Q. Based on your recollection again, here,
24 Father, is there anything from Mr. Goldstone's
25 testimony that you can recollect having read that

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1 you would rely on here?
2 A. I wondered why suddenly he is saying

3 that yes, it's possible that cigarettes have
4 killed a lot of people, like in the thousands,
5 and it was very abrupt because that has not been
6 the position of the industry, and I wondered what
7 lawyer counseled him to say this and why did he
8 say it.

9 Q. Do you know that a lawyer counseled him
10 to say that?

11 A. He is a lawyer himself. But I
12 wondered. I didn't say I did. I wondered if a
13 lawyer counseled him to say this as part of a
14 strategy.

15 Q. Aren't you confusing Mr. Goldstone with
16 Mr. Bible here?

17 A. It could be. Mr. Bible. Yes.

18 Q. Let me just, well, let me just ask you
19 this, is there anything else that you can recall
20 that you believe came from the deposition of
21 Mr. Goldstone that you would rely on?

22 A. Didn't he also say that these things
23 can be lethal?

24 Q. Well, is that your recollection?

25 A. That's my recollection. Yes.

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1 Q. Well, let me just read you a question
2 and an answer from Mr. Goldstone's deposition
3 which I believe has been much misquoted in the
4 press and see if you recollect this question and
5 this answer. This is at page 25, Counsel.

6 Question: I take it, sir, do you
7 accept that cigarette smoking is a cause of
8 disease in humans?

9 That's the question that you were
10 thinking of, correct?

11 A. Yes.

12 Q. Answer: I will tell you because I'm
13 not a scientist and I respect the views of
14 scientists at our company who very compellingly
15 explain to me why there are gaps in the
16 scientific knowledge. I have only been in this
17 company a number of years. I was a smoker myself
18 at one time, and I have always believed rightly
19 or wrongly, I have always believed that smoking
20 plays a part in causing lung cancer. What that
21 role is I don't know. But I do believe it.

22 Is that the testimony you were thinking
23 of, Father?

24 A. Yes.

25 Q. Is there any other testimony that you

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1 can recall, as you sit here, from the testimony
2 of Mr. Goldstone that you believe was relevant?

3 A. Is there a question and answer after
4 that?

5 Q. Question: Your answer to my question
6 is yes? Answer: Yes, sir. If you would like to
7 look at any of them.

8 A. Is there a question after that?

9 Q. Mr. Goldstone, in your prior answer,
10 you mentioned the word adults have a freedom of
11 choice, which is a cherished right in your
12 country. I would ask you, sir, if a corollary of
13 freedom of choice is full disclosure so you have

14 all the cards on the table in order to exercise
15 choice.
16 Answer: I think the cards have to be
17 on the table to exercise free choice.
18 But I don't believe there is any other
19 question and answer on causation.
20 A. It might be on the other deposition.
21 Q. Is there anything else other than the
22 first question and answer that I read to you from
23 the Goldstone deposition that you recall as you
24 sit here as relevant?
25 A. I read it very carefully and I went

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1 back to the Frank Statement that there is no
2 proof that cigarette smoking is one of the
3 causes. We believe that our products are not
4 injurious. So there has been a change.
5 Q. Father, the Frank Statement was made in
6 1954, correct?
7 A. Yes.
8 Q. Mr. Goldstone's testimony was given in
9 1997, correct?
10 A. For the first time by any major
11 executive of a tobacco company.
12 Q. That's the first time that you know of,
13 is that right?
14 A. First time I know of. If there is
15 another, give it to me.
16 Q. Is there anything from the deposition
17 of Mr. Bible that you can recall?
18 A. I remember the second or third
19 question: Do you then, sir, say that this caused
20 thousands -- and he made some answer.
21 Q. What answer did he make?
22 A. Yes. Could be several thousand. He
23 would concede that several thousand people.
24 Q. It is possible, he said?
25 A. Yes. I know.

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1 Q. Is there anything else besides that
2 statement of Mr. Bible that you recall that's
3 relevant?
4 A. Not to my particular framework of legal
5 ethics.
6 Q. Father, you have been furnished with
7 some documents related to a company called Hill &
8 Knowlton. Do you remember that?
9 A. I remember. Yes.
10 Q. Do you remember what Hill & Knowlton
11 was?
12 A. A PR firm.
13 Q. Do you remember the documents?
14 A. They left this business a long time
15 ago, Hill & Knowlton. They were there at the
16 beginning. They dropped the tobacco account, for
17 many reasons, I suppose.
18 Q. You don't know what those reasons
19 were?
20 A. Well, it's not clear to me from all the
21 literature whether they felt we can't do this or
22 whether the tobacco companies wanted somebody
23 else. Companies do in fact change their PR
24 persons on a regular basis. Hill & Knowlton has

25 lost other accounts through the years.

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1 Q. Father, do you have any opinion here or
2 any facts to support an opinion that the Hill &
3 Knowlton company participated in any kind of
4 lawyer misconduct or improper lawyer activity?

5 A. They could have been but that's almost
6 ancient history. Refresh our recollection, when
7 did Hill & Knowlton leave the tobacco industry?

8 Q. Father, let's just rely on what you
9 know or don't know.

10 A. In that era, when they were
11 representing them, I assume that they worked very
12 closely with the lawyers in order to bring about
13 the objectives that the Frank Statement says,
14 that we want to protect cigarettes. I assume
15 that they did that. I don't have any empirical
16 evidence that the lawyers collaborated with Hill
17 & Knowlton.

18 Q. You don't have any information that
19 Hill & Knowlton has done anything wrong with
20 smoking?

21 A. Frankly my impression was negative.
22 They left years ago. Again, I don't know why
23 they left. I don't have any specific charge to
24 make that Hill and Knowlton did unethical things.

25 Q. With respect to the Frank Statement,

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1 you understand that Hill and Knowlton was
2 involved in the publication of the Frank
3 Statement?

4 A. I know. They wrote it.

5 Q. And there is nothing in the world wrong
6 with getting assistance, which companies do --
7 almost probably every big company, in which
8 Georgetown does, and which probably the society
9 does -- to get the assistance of public relations
10 people in making statements and in presenting the
11 image of your company to the public, correct?

12 A. No. Correct.

13 Q. I think I might have asked a positive
14 and negative there, and I apologize. I have to
15 repeat it. Let me just make sure we are clear.
16 It's entirely appropriate for a company, whether
17 a tobacco company or a university, to obtain the
18 services of a public relations firm to assist it
19 in its business?

20 A. Yes.

21 Q. And it would be entirely appropriate if
22 a company did spend millions and millions of
23 dollars of its money voluntarily to fund
24 independent scientists to research smoking and
25 health issues and wanted to get some credit for

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1 that in the public eye. There is nothing wrong
2 with that is, there, Father?

3 A. Assuming they are independent.

4 Q. Assuming they are independent, is there
5 anything wrong with that?

6 A. Once again, assuming they are
7 independent.

8 Q. Again, we can go back over this. But I
9 think these places like Harvard and Boston

10 University and these various scientists, when
11 these people are funded and they publish their
12 research, either bad or good, if the company
13 wants to hire a public relations firm to try to
14 get that fact publicized that they have made this
15 contribution to these independent scientists,
16 that's perfectly okay, isn't it?

17 A. Yes.

18 Q. And in fact, Georgetown University, I
19 assume, does have a public relations firm?

20 A. Surprise. Yes.

21 Q. Who is that firm, if you know?

22 A. I don't think they have a firm. They
23 have in-house PR people.

24 Q. All right. Does the Society of Jesus
25 have a PR firm?

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1 A. No. We do it ourselves.

2 Q. Father, if I could refer back one more
3 time, and I think this may be the last time, to
4 your disclosure statement, Drinan Exhibit 1, you
5 state in this disclosure on page 2, the second to
6 last paragraph, Father Drinan to offer, and I
7 assume that's a typo, it should say Father Drinan
8 will offer?

9 A. Yes.

10 Q. It should read Father Drinan will offer
11 testimony about the lobbying of the tobacco
12 industry and that such lobbying activities
13 affected public health policies in the United
14 States as it related to smoking and health. Do
15 you see that?

16 A. I do.

17 Q. And what testimony do you intend to
18 give, Father, on that subject?

19 A. I have agreed to do this. This is done
20 in my capacity as an expert in legal ethics.
21 It's my capacity as a former member of the House
22 for ten years and consequently I'm entitled to be
23 heard now as an expert. I saw the tobacco
24 companies come forward with the PACs, the
25 Political Action Committees in the '70s, when

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1 they were created, and I saw what they did to
2 those that disagreed with them. They defeated
3 the late Mike Synar or helped to defeat him, of
4 Oklahoma, and he was one of the great opponents
5 of the tobacco industry and they gave money to
6 Richard Durbin, who is now the Senator from
7 Illinois. I have seen how they come to the Hill,
8 anything that is of interest to them they are
9 active in lobbying.

10 I'm not suggesting that that is illegal
11 at all. They are very aggressive in lobbying
12 activities. They know exactly what they want.
13 You will see in my revelation, of all the things
14 that I tried to do is that I wanted to strengthen
15 the label or the warning on tobacco and that of
16 course was opposed by them. I wanted to increase
17 the excise tax. I filed a statement that we
18 should have smoke-free public buildings and also
19 that the airlines should have more nonsmoking
20 flights.

21 Obviously they opposed all of those
22 things. They are very active in lobbying openly
23 and now more and more in the Political Action
24 Committees.

25 Q. Again, from your experience as a member
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1 of Congress and your personal experience on this
2 that we'll use as a basis, you are not saying
3 that any of the lobbying activities of the
4 tobacco industries were in any way illegal or
5 improper?

6 A. Well, except that they were concealing
7 facts, causing confusion, denying the validity of
8 all of the reports that were coming out then
9 about the evil aspects of tobacco. They were
10 confusing and deterring knowledge, inhibiting
11 knowledge. They were a negative force in this.
12 I can't say that it was illegal.

13 They have a right under the First
14 Amendment, but that it certainly was
15 inappropriate to go against the total consensus
16 of the public health community and say to the
17 Congress, you can't act upon the best information
18 that you have. That information is untrue or
19 misguided.

20 Q. I want to come back to my question now.

21 A. All right.

22 Q. My question was very simple. That is,
23 you have observed lobbying by the tobacco
24 industry in your career as a Congressman?

25 A. That's right.

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1 Q. And you have observed lobbying by
2 virtually every other industry that there is in
3 America?

4 A. That's right.

5 Q. And you are not saying that the
6 lobbying that was inferred or any facts or
7 information that you have indicates that they
8 were doing anything other than exercising in a
9 legal way their First Amendment rights?

10 A. No. I'm saying that they were
11 concealing information, misleading the Congress
12 and the country, and doing things that other
13 legitimate lobbies do not do.

14 These people were withholding
15 information, concealing, misguiding the public.
16 I think it's unique. Maybe some other industries
17 were doing that but in the enactment of the Clean
18 Air Act and other things, they were on the
19 negative side. I read their information very
20 carefully for ten years. They were opposed to
21 anything that would inhibit the use of smoking.

22 Q. Father, can you point to a single
23 statement, specific statement, made by a tobacco
24 industry lobbyist, specific lobbyist, that was a
25 false statement that you know of?

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1 A. I didn't say false. I said misleading.

2 Q. A misleading statement?

3 A. Yes, I can. All through that decade,
4 they were saying, well, it's still an open
5 question whether smoking is wrong when the

6 Surgeon General has said the opposite, when
7 eventually the AMA said the opposite. All of
8 these public health officials in this community,
9 they were taking them on and raising a big cloud
10 of uncertainty about them. I'm not saying that
11 they were telling lies. They were just
12 misconceiving or misconstruing the truth and
13 misleading the people.

14 They were being good to certain
15 Congressmen who would support them. Another
16 issue in which they were always on, in my
17 opinion, the wrong side, we need subsidies for
18 tobacco. I always voted against them, as did
19 many, many people. They were there saying we
20 have to have the subsidies.

21 Q. Father, we agree that there is a First
22 Amendment right to lobby our elected officials,
23 correct?

24 A. Yes.

25 Q. And that's a right that the tobacco
324

1 industry has, like any other industry?

2 A. Yes.

3 Q. Or any private person?

4 A. Yes.

5 Q. And no tobacco lobbyist that you know
6 violated the laws relating to the right to lobby?

7 A. I can't say that.

8 Q. Can you say that any did?

9 A. It depends upon what you mean by the
10 obligation of lobbyists not to mislead or conceal
11 information and to more or less tell the truth.
12 Everybody is obviously entitled to give your own
13 side. But my feeling is that the, once again,
14 that the lobbyists for the tobacco industry
15 withheld information.

16 Q. Father, all you are saying here is that
17 the company's positions, that they were putting
18 out publicly, were taken by the lobbyists as well
19 as the other employees of the company, is that
20 correct?

21 A. I assume that, but many of the
22 lobbyists were lawyers. They have the obligation
23 to follow legal ethics even when they are
24 lobbyists.

25 Q. We have already established that you
325

1 are not prepared to identify any individual
2 person who withheld information in this respect,
3 is that correct?

4 A. We have agreed because that's not my
5 role.

6 Q. You have mentioned a number of things
7 that the tobacco lobby in Congress was opposed
8 to. I want to review some of those. They were
9 opposed to the election of Richard Durbin to
10 become the Senator from Illinois, correct?

11 A. Yes.

12 Q. And he did become the Senator from
13 Illinois?

14 A. That's correct.

15 Q. And they were opposed to the increase
16 in the excise tax which you were very much a

17 proponent of?
18 A. Right.
19 Q. And the excise tax was in fact
20 increased?
21 A. After I left.
22 Q. Yes. But very shortly after you left.
23 A. Mr. McCormick, my position is that they
24 deterred effective, sane legislation with regard
25 to tobacco.

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1 Q. Let me come back to my question,
2 Father, you proposed a doubling of the excise tax
3 from 8 cents to 16 cents from 1979 and 1980. It
4 went into effect January 1, 1983, didn't it?
5 A. I was out of Congress.
6 Q. I understand that, but by 1983, your
7 proposal was in place, correct?
8 A. Yes.
9 Q. Now, they also opposed your position on
10 the strengthening of the warning labels?
11 A. That's right.
12 Q. In fact, warning labels, that's the
13 province of the Federal Trade Commission,
14 correct?
15 A. I think so.
16 Q. And the Federal Trade Commission did in
17 fact strengthen the warnings and change the
18 warnings to require the stronger wording and the
19 rotation of the warnings?
20 A. The word addicting is still not there.
21 Q. But the warning labels were
22 strengthened, correct?
23 A. Not enough.
24 Q. In your opinion, not enough.
25 A. In the opinion of the total public

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1 health community.
2 Q. Father, you can't speak for the total
3 public health community?
4 A. I certainly can. Name any individual,
5 any group in the public health community who is
6 opposed to that consensus.
7 Q. Would you consider the AMA a member of
8 the public health community?
9 A. The American Medical Association?
10 Q. Yes.
11 A. I'm not certain.
12 Q. You may be more certain in just a
13 minute. Father, in connection with the materials
14 that you were furnished in this case, you were
15 furnished with a letter from the American Medical
16 Association to the chief of the division of trade
17 and regulation rules of the Federal Trade
18 Commission, correct?
19 A. What date is that?
20 Q. Dated February 28th, 1964. You were
21 furnished with a letter from the AMA in which the
22 AMA was writing to say that they didn't believe
23 that cautionary labeling would serve the public
24 interest with any particular degree of success?
25 A. In 1964, a lot of people were united

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1 like that. What did they say in 1994?

2 Q. My question was this, do you recall
3 receiving, being asked to review in connection
4 with your work in this case a letter in which the
5 American Medical Association on February 28,
6 1964, on the subject of warnings, says, with
7 respect to cigarettes, cautionary labels cannot
8 be anticipated to serve the public interest with
9 any particular degree of success. The health
10 hazards of excessive smoking have been well
11 publicized for more than ten years and are common
12 knowledge. End of quote. That was what the AMA
13 said in 1964.

14 A. I'm glad they have learned a lot since
15 then.

16 Q. Well, they knew in 1964, as one of the
17 foremost authorities in the United States on
18 public health matters, that the hazards of
19 smoking had been well-known for over ten years.
20 Did you know that in 1964?

21 A. I think so.

22 Q. Let me come back to my question.

23 A. Okay.

24 Q. You also mentioned -- let me come
25 back. I have to get this clarified. I

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1 apologize. I hate to repeat this, but I do have
2 to have a direct answer. Let me start that
3 over. You have described as a result of your,
4 and on the basis of your experience as a
5 Congressman, the efforts made and the aggressive
6 lobbying efforts of the tobacco industry,
7 correct?

8 A. Yes.

9 Q. And the political appeal of the tobacco
10 industry was at one time in this country very
11 strong, correct?

12 A. Political appeal, you mean more people
13 smoked?

14 Q. Well, for whatever reason, the
15 political power and the political appeal of the
16 tobacco industry was very strong at one time,
17 correct?

18 A. Yes.

19 Q. And you would agree with me, I feel
20 very certain, that by 1978, Father, the political
21 appeal of the tobacco industry was, as you once
22 characterized it, frail and falling, correct?

23 A. Not a bad word. Where did I say that?

24 Q. Let me ask you, well, first of all
25 before we get to it, and I will get to it in a

330

1 minute, whether you said it or not, that is in
2 fact a correct statement, isn't it?

3 A. I think so.

4 MR. McCORMICK: Could you mark this as
5 our next exhibit.

6 (Drinan Exhibit No. 10 was
7 marked for identification.)

8 BY MR. McCORMICK:

9 Q. Back on the record, Father. Showing
10 you what's been marked for identification as
11 Drinan Exhibit 10, that is an article written by
12 you and published in the Newton Graphic newspaper

13 in February of 1978, correct?

14 A. Yes.

15 Q. And do you see on the right-hand column
16 of that paper, of that article, where you make
17 the following statement -- Tobacco growers are
18 concentrated in 24, I believe it is,
19 Congressional districts in seven states.
20 Twenty-one of these districts are in four states,
21 North Carolina, Kentucky, Tennessee, and
22 Virginia. Congressmen from these districts have
23 regularly been members of the House Agricultural
24 Committee's Subcommittee on Tobacco. From this
25 political perch they protect the tobacco growers

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1 and the tobacco lobby; yet even these members of
2 Congress realize that the political appeal of the
3 tobacco industry is frail and falling. End of
4 quote.

5 Did you write that and have it
6 submitted to the Newton Graphic in February of
7 '78?

8 A. I did.

9 Q. The article, Father, is, calls for
10 developing a national policy against smoking. Is
11 that correct?

12 A. I think so.

13 Q. Well, that's the headline.

14 A. That's right.

15 Q. And sometimes the author of the
16 document is not necessarily the author of the
17 headline.

18 A. You're right.

19 Q. But in this case I want to make it
20 clear, were you the author of that headline?

21 A. I have no recollection.

22 Q. You would agree, I take it, Father,
23 that that headline properly characterizes what
24 this article is about?

25 A. That's correct.

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1 Q. Father, can I ask you, I don't believe
2 this is in your disclosure, but some of the
3 documents that you were furnished to review are
4 documents concerning responses that have been
5 made by tobacco companies to discovery requests
6 in certain litigation, not this one in
7 particular?

8 A. No.

9 Q. Do you intend to give any opinions that
10 you know of at this point that there was anything
11 improper about the responses that were made to
12 litigation discovery requests?

13 A. Well, that's not in my material at
14 all. State the question again. State the
15 problem.

16 Q. My question is simply this. Do you
17 intend to give any opinion, or do you have any
18 facts that suggest that tobacco industry lawyers
19 have done anything improper with respect to
20 responding to discovery requests,
21 interrogatories, requests to admit, or document,
22 requests for document production?

23 A. You mean in the 40 states where people

24 are suing?

25 Q. In any litigation?

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1 A. I don't have material on that. But I'd
2 like to see the facts. How can they resist?

3 Q. I'm not suggesting that they have,
4 Father. My question is have you been furnished
5 with any facts that suggest to you that the
6 tobacco industry lawyers, any specifics that the
7 tobacco industry lawyers have not properly
8 responded to litigation discovery?

9 A. No.

10 Q. You understand, Father, that within the
11 tobacco industry, there are many different
12 companies and that some have been involved in
13 litigation more than others?

14 A. I see the list of the eight or ten big
15 ones. I'm familiar with that.

16 Q. If you look back over time and you have
17 looked at this litigation history, you understand
18 that the, some of these companies who had the
19 largest market share, the biggest share of the
20 market back in the 1950s, and the 1960s, when the
21 public controversy really became a firestorm,
22 that they tended to be the companies who were
23 sued in these cases?

24 A. I remember. I know.

25 Q. And that other companies, including the

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1 Brown & Williamson company, was for many years
2 rarely, if ever, sued?

3 A. Yes.

4 Q. And that for some of these companies,
5 the deep involvement, the extensive involvement
6 in litigation, did not occur until really the new
7 wave of litigation that began as a result of the
8 events in the 1994 period, do you understand
9 that?

10 A. I understand. Yes.

11 Q. Father, in connection with your
12 testimony in this case, you have said that you
13 have reviewed a variety of different, a number of
14 different judicial opinions relating to the
15 tobacco industry, is that correct?

16 A. Yes.

17 Q. And do you intend to rely on those
18 judicial opinions in your testimony?

19 A. This is on the crime/fraud exception,
20 right?

21 Q. On that or on any issue?

22 A. I would think so, that these are quite
23 persuasive. As you know, not all have been
24 finalized. But I would think that the language
25 and the reasoning here would be very helpful.

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1 Q. Again, you are referring to a
2 document. Could I see the document you are
3 referring to? The paper clip came off this.

4 MR. McCORMICK: Could we mark this as
5 the next exhibit?

6 (Drinan Exhibit No. 11 was
7 marked for identification.)

8 BY MR. McCORMICK:

9 Q. Father, I have marked now as deposition
10 exhibit, a document, and the first page of it is
11 numbered page 6, but I can't do anything about
12 that.
13 A. I don't know where the first five pages
14 might be. I'm not certain they ever came to me.
15 Q. This document is numbered 6 through
16 page 24.
17 A. Recent Court Rulings on Crimes or Fraud
18 by the Tobacco Industry.
19 Q. Where did you get that document?
20 A. Did it come from you people? It must
21 have.
22 Q. You were supplied this by the lawyers
23 for the Attorney General?
24 MR. CLARKSON: I believe this is part
25 of the Waxman papers.

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1 MR. McCORMICK: Could I see it?
2 THE WITNESS: Yes. I'm sorry, sir.
3 It's my fault. I had them out of order. That's
4 it.
5 (Witness proffers document.)
6 BY MR. McCORMICK:
7 Q. You are now handing me some additional
8 pages here. We still start with 3. Do you have
9 2 or 1 anywhere, Father? We'll just get this all
10 together?
11 A. No. I think these are separate
12 documents. Could it be that? That is probably
13 the one. This comes from the Congress.
14 MR. CLARKSON: This is part of the
15 Waxman papers.
16 MR. McCORMICK: We are still missing
17 pages numbered 1 and 2.
18 THE WITNESS: Sorry. I don't seem to
19 have it.
20 BY MR. McCORMICK:
21 Q. You have just given me five more pages,
22 a title page and table of contents and pages
23 numbered three through five. I'm going to add
24 these to the exhibit and ask that this revised
25 exhibit be renumbered with an original sticker as

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1 Exhibit 11.
2 MR. KLOK: If you could read the title
3 of the exhibit.
4 MR. McCORMICK: I will.
5 BY MR. McCORMICK:
6 Q. I'm going to show you what's been
7 remarked as Drinan Exhibit 11 which is entitled
8 Secret Attorney-Client Documents Are Evidence of
9 Potential Crimes or Fraud by the Tobacco
10 Industry. Now, that's a nice neutral sounding
11 objective title, isn't it, Father?
12 A. Not quite a law review, is it?
13 Q. It really shows the bias of the authors
14 of this, doesn't it? Doesn't it, Father?
15 MR. CLARKSON: It does reflect the
16 truth of the content.
17 BY MR. McCORMICK:
18 Q. Now, Father, this document, as you
19 correctly stated before, and we'll give you a

20 copy of it, but let's keep all the organization
21 together. This document, as you correctly stated
22 before, refers to potential crime or fraud,
23 allegations of crime or fraud by tobacco industry
24 lawyers, correct?

25 A. Yes.

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1 Q. But you had mentioned earlier, I think,
2 in your testimony that you had read an opinion by
3 Judge Sarokin in the Hanes case, correct?

4 A. I know.

5 Q. And you volunteered that as something
6 that you were relying on here, is that correct?

7 A. Not relying on. It's a fact that came
8 down.

9 Q. It's a fact that the opinion was
10 rendered but it is not necessarily true that what
11 is said in that opinion is factually correct, is
12 it?

13 A. Right.

14 Q. And you know that that opinion was
15 taken to the Third Circuit?

16 A. And reversed.

17 Q. Did you read the Third Circuit's
18 reversal?

19 A. However, they did not set aside the
20 basic core of the problem that there could be
21 something wrong here. I have forgotten the
22 technicality on which they reversed it, but they
23 did.

24 MR. KLUGMAN: Just again, it was not
25 reversed, it was vacated.

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1 BY MR. McCORMICK:

2 Q. It wasn't a technicality at all. The
3 Third Circuit found that Judge Sarokin was not
4 only wrong, but that he had violated the rule
5 requiring him to maintain an appearance of
6 impartiality?

7 A. And I agree with that. I think that he
8 blew it.

9 Q. What the Third Circuit said was it is
10 impossible for us to vindicate the requirement of
11 an appearance of impartiality in view of the
12 statements made by Judge Sarokin. You agree with
13 that, don't you?

14 A. Yes.

15 Q. Did you also mention, Father, the
16 somewhat much publicized opinion by Judge Green
17 in the Maddox against Williams case?

18 A. Harold Green?

19 Q. Whichever Green it was. Was that one
20 of the opinions you mentioned today?

21 A. Judge Harold Green in the D.C. Circuit
22 here?

23 Q. Correct. In the case of Maddox against
24 Williams?

25 A. Is that the papers?

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1 Q. No. Well, the question is do you
2 recall that?

3 A. I don't recall mentioning that
4 decision, no, today.

5 Q. And you haven't read an opinion by
6 Judge Green in the case of Maddox against
7 Williams that you can recall?

8 A. I may have. What's that about? Who
9 are the plaintiffs? Is that --

10 Q. Well, if you don't remember the case
11 then it's really not significant. Father, in
12 terms of these judicial opinions, and putting
13 aside the litigation that is ongoing with respect
14 to the attorney-client privilege --

15 A. Yes.

16 Q. -- is there any other judicial opinion
17 that you have ever read or heard of in which
18 tobacco company lawyers are criticized for their
19 ethical conduct in the defense of the litigation
20 of these cases?

21 A. Well, I think this goes back to the
22 crime/fraud. I don't know whether the industry
23 or the lawyers are criticized, but they lose in
24 some of these cases and that they are told that
25 these things are discoverable and that the client

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1 privilege is not applicable in this case.

2 Q. But I want to, we have spent
3 considerable time this morning on the
4 attorney-client privilege crime/fraud issues. I
5 really want to put that aside since we have
6 already covered it. Aside from issues relating
7 to the privilege, including crime/fraud issues --

8 A. Yes.

9 Q. -- are you familiar with any opinion in
10 which tobacco company lawyers have been
11 criticized by a judge as having engaged in any
12 kind of wrongdoing or improper conduct in the
13 defense of litigation?

14 A. I don't think that would be the role of
15 the judge. The judge decides the case yes or no
16 and he shouldn't be like the judge in the Third
17 Circuit and pop off at the attorneys.

18 Q. So the judge in the Third Circuit,
19 namely Judge Sarokin, that's the only judge you
20 know of?

21 A. To my knowledge, yes.

22 Q. In the course of your work and your
23 study as an expert in legal ethics, you are
24 familiar, I take it, with the rules on conflict
25 of interest?

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1 A. I'm afraid so. Yes.

2 Q. And have you had substantial
3 involvement in that?

4 A. Too much.

5 Q. And do you consider yourself an expert
6 on that subject?

7 A. I'm afraid so.

8 Q. And have you been retained as a
9 consultant from time to time on those questions?

10 A. Yes. That question is almost inherent
11 in every problem of legal ethics. It's there.

12 Q. And the fundamental rule is that a
13 lawyer owes, when a lawyer takes on a
14 representation, that lawyer owes that client a
15 duty of loyalty and zealous representation,

16 correct?
17 A. The term zealous actually is not in the
18 model rules but it says the same thing.
19 Q. It's in the Fifth Circuit opinion on
20 this?
21 A. Zealous.
22 Q. Whether it's that term, the substance
23 is the same, correct?
24 A. The better term in my judgment is
25 undivided rather than zealous.

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1 MR. CLARKSON: It's almost, it's
2 quarter of 5:00. Can we take a break now?
3 MR. McCORMICK: Of course. Let's go
4 off the record.
5 (Discussion off the record.)
6 (Recess.)
7 (Whereupon, at 5:00 p.m., the
8 deposition adjourned to be resumed on Tuesday,
9 October 8, 1997, at 8:30 a.m.)

10
11
12 _____
13 Signature of the Witness

14 SUBSCRIBED AND SWORN to before me this _____
15 day of _____, 19__.

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17 _____
18 NOTARY PUBLIC
19 My Commission expires: _____
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